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Supreme Court of the United States

October Term, 1977

No. 77- **1306**

LEONARD C. JAQUES,
Appellant,

vs

STATE BAR GRIEVANCE ADMINISTRATOR,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

JURISDICTIONAL STATEMENT

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IN THE

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No. 77-

IN THE MATTER OF LEONARD C. JAQUES,
Appellant.

ON APPEAL FROM THE
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JURISDICTIONAL STATEMENT

The appeal is the result of disciplinary proceedings against a member of the bar of the State of Michigan. Pursuant to Michigan procedure, a Complaint was filed by the State Bar Grievance Administrator charging Appellant with professional misconduct. A local hearing panel composed of three lawyers heard evidence pertaining to those charges. That panel's recommendation was accepted in pertinent part by the State Bar Grievance Board.

Upon review, the Supreme Court of Michigan entered an order affirming the suspension of Appellant's license to practice law. That Court also entered an order on December 15, 1977[1], amended December 20, 1977[2], denying Appellant's Application for Rehearing. From those orders of the Supreme Court of Michigan, Appellant brings his appeal to this Court.

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[1] 37a
[2] 38a

By an action in the United States District Court for the Eastern District of Michigan, Southern Division, Appellant sought to enjoin the enforcement of the suspension. After conducting a hearing, the Honorable Robert D. DeMascio entered a preliminary injunction which is appended hereto at 42a. Subsequently, the parties filed a Stipulation of Facts 40a which sets forth the conduct for which Appellant's license to practice law was suspended. That case is presently pending and a final decision is anticipated shortly.

OPINIONS BELOW

The opinion of the Supreme Court of Michigan is reported at 401 Mich 516; ..... NW 2d ..... (1977) and is appended hereto at 1a. The order of the Michigan Supreme Court denying Appellant's Application for Rehearing is reported at 402 Mich 955 (1977) and is reprinted herein at 38a.

JURISDICTION

The effect of the final judgment of the Supreme Court of Michigan is to sustain the validity of DR 2-103 against the contention that it is repugnant to the First Amendment and Fourteenth Amendment to the Constitution of the United States. This Court's appellate jurisdiction is predicated on 28 USC §1257(2).

On direct appeal to the state court, Appellant argued, in substance, that the First Amendment protected from infringement the conduct of Appellant. While the argument was not expressed directly in terms of that Constitutional guarantee, the Reply Brief pointedly directed the attention of the Michigan Supreme Court to the decisions of this Court upon which the outcome of this appeal turns.

The Notice of Appeal was filed in the Michigan Supreme Court on March 16, 1978 as set forth in the Supplementary Appendix to Jurisdictional Statement

"The charge does not state a violation of any present rule of ethics. Concededly, 'former Canon 28' (cited as having been violated) did, *apparently,* make it '. . . unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so.' But the naked statement of the rule, viz, that one may not '. . . volunteer advice to bring a lawsuit except in rare cases . . .' was never applied. *In re Ades,* 6 F Supp 467, 474-475 (D Md, 1934); ABA Op 148. It has been held to infringe the freedom of speech protections of the first amendment of the United States Constitution. *United Transportation Union* v *State Bar of Michigan,* 401 US 576; 371 US 415; 83 S Ct 328; 9 L Ed 2d 405 (1963)." Appellant's Reply Brief in the Supreme Court of Michigan, p. 38; emphasis in the original.

"We are of the opinion the reasoning set out above no longer supplies a valid ground for a rule proscribing communications of a lawyer; that a lawyer may not be disciplined merely for making a 'request'. DR 2-103(B) [sic], taken literally, is impermissibly broad. It involves a legislative over-kill which interferes with rights of the public as well as members of the profession. It makes the mere speaking to a layman, client or not, a perilous activity, for a slip of the tongue may constitute a 'request'. It imposes a restraint upon the lawyer's freedom of communication; *more important, it encumbers the access of the public to that communication.* Activities of a lawyer, involving communications with others, none of whom complain, cannot, without more, be made a ground of suspension merely because we, as a profession, 'disdain it'. Certainly 'self respect' of the profession is an important consideration, but it cannot survive a collision with the right of the public to be served. When we seek to proscribe words

which have offended no one but ourselves we have, therefore, pushed the matter too far: the rules of ethics then serve mere professional self-interest and collide with the constitutional rights of others. *United Transportation Union* v *State Bar of Michigan,* 401 US 576; 91 S Ct 28 L Ed 2d 339; 1076 (1971); *NAACP* v *Button,* 371 US 415; 83 S Ct 328 9 L Ed 2d 405; (1963); *Virginia State Board of Pharmacy* v *Virginia Citizens Consumer Council,* ..... US .....; 96 S Ct .....; 48 L Ed 2d 346 (1976)." Appellant's Reply Brief, supra, p. 46; Emphasis in the original.

Additionally, in deciding this case below, the Supreme Court distinguished it from *Bates* v *State Bar of Arizona,* ..... US .....; 97 S Ct 2961; 53 L Ed 2d 810 (1977). See *State Bar Grievance Administrator* v *Jaques,* 401 Mich 516, 543, fn 7; ..... NW ..... 2d ..... (1977). The efforts of the State Court to distinguish the First Amendment principles of *Bates* adequately demonstrate consideration by that Court of the inherent question of whether the Disciplinary Rule in question offends the First and Fourteenth Amendments to the Constitution of the United States. See *Oregon* v *Haas,* 420 US 714, 719, 720; 95 S Ct 1215; 43 L Ed 2d 570, 576 (1975); *Jenkins* v *Georgia,* 418 US 153, 157; 94 S Ct 2750; 41 L Ed 2d 652, 648 (1974); *Ocala Star-Banner Company* v *Damron,* 401 US 295; 91 S Ct 628; 28 L Ed 2d 57, 61, fn 3 (1971); *Raley* v *Ohio,* 360 US 423, 436; 79 S Ct 1257; 3 L Ed 2d 1344, 1354 (1959).

On appeal to the Supreme Court of Michigan, Appellant contended that his conduct did not constitute a violation of DR 2-103. The state court's decision adopted a unique construction of that Disciplinary Rule. DR 2-103 was construed as prohibiting an attorney who represents the survivor of a union member killed in an explosion from asking the business agent to join the union as co-plaintiff in

a federal court mandamus action seeking a Coast Guard investigation. 401 Mich 516, 540, 541; ..... NW 2d ....., ... (1977). In addition, the Disciplinary Rule was construed as prohibiting an attorney from giving business cards and and form contracts to the business agent who had them in his effort to find capable representation for the union members and their survivors and from telling the business agent that he could give out Appellant's business cards "if he wanted to".

When that novel construction was imposed, Appellant filed a timely application for rehearing. There, he asserted that the disciplinary rules, as construed, were violative of the guarantees of the First and Fourteenth Amendments by reason of their overbreadth and by reason of the fact that they prohibited freedom of speech and freedom to associate for purposes of redressing grievances. Where, as here, the state court decision provides a new construction which first gives rise to the federal question, an Application for Rehearing setting forth the federal grounds amply preserves the issue for review by this Court. *Hedndon* v *Georgia,* 295 US 441, 444; 55 S Ct 794; 79 L Ed 1530, 1533 (1935); *Great Northern Arco* v *Sunburst Oil & Refining Co.,* 287 US 358, 367; 53 S Ct 451; 74 L Ed 1107, 1112 (1930); *Missouri* v *Gehner,* 281 US 313, 320; 50 S Ct 326; 74 L Ed 370, 875-876 (1930).

On appeal to the Supreme Court of Michigan, Appellant contended that his efforts to seek joinder by the union in the federal mandamus action was permitted by Rule 23 of the Federal Rules of Civil Procedure. Accordingly, this Court has appellate jurisdiction under 28 USC §1257(2) to decide whether the state Disciplinary Rule, as construed, violates the supremacy clause (article 6, clause 2) of the Constitution of the United States by imposing a penalty

on the exercise of the prerogatives of federal practice.

Finally, Appellant argued that the procedures employed violated the due process guarantees of the Fourteenth Amendment. In particular, Appellant urged that due process was violated when the hearing panel received and considered as substantive evidence an edited transcript of prior testimony of witnesses who did not appear before the hearing panel. The Michigan Supreme Court recognized the error, but affirmed Appellant's suspension. 401 Mich 516, 532. Appellant also urged that he was denied due process when the hearing panel quashed a subpoena, thereby depriving Appellant of the right to call witnesses on his behalf. The Michigan Supreme Court recognized that, as a matter of state law, Appellant should have been permitted to call the witness. 401 Mich 516, 535. That Court, however, concluded that, "we do not believe the action of the hearing panel in quashing the subpeona deprived Mr. Jaques of a fair hearing." 401 Mich 516, 535. Appellant also contended on appeal that the administrative tribunal was not an impartial one and that he was denied an opportunity to demonstrate that partiality. The Supreme Court of Michigan perceived no denial of due process from the refusal to permit him to inquire as to bias. 401 Mich 516, 537. Therefore, under 28 USC §1257(3), this Court has jurisdiction to decide whether the procedures employed in the state courts comport with the due process guarantees of the Fourteenth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case are set forth in full in the appendix, *infra,* at 39a, as follows:

Constitution of the United States, Amendment 1
Constitution of the United States, Amendment 14
Code of Professional Responsibility, Disciplinary Rule 2-103 (A), adopted by the Supreme Court of Michigan
Code of Professional Responsibility, Disciplinary Rule 2-103 (C), adopted by the Supreme Court of Michigan

QUESTIONS PRESENTED[1]

I Whether the disciplinary rules, as construed and applied to Appellant, are repugnant to the guarantees of the First and Fourteenth Amendments.

A. Whether the decision is in conflict with *NAACP* v *Button,* 371 US 415 (1963), *Brotherhood of Railroad Trainmen* v *Virginia,* 377 US 1 (1964) and *United Transportation Union* v *State Bar of Michigan,* 401 US 576 (1971) which hold that the First Amendment authorizes an attorney and organization to act collectively to assure meaningful access to the courts.

B. Whether the decision is in conflict with *NAACP* v *Button, supra,* which holds that a statute which, on its face, prohibits both protected and unprotected speech, offends by its overbreadth the guarantees of the First Amendment.

C. Whether the decision below conflicts with *Bates* v *State Bar of Arizona,* 45 U.S.L.W. 4895 (1977) by prohibiting the free flow of information from an attorney to one desiring to hear the attorney's message in the absence of a compelling state interest expressed in a narrowly drawn regulation.

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[1] To the extent that the questions presented are more properly raised by a petition for certiorari, appellant requests that these papers be so treated. 28 USC § 2103.

II Whether the decision by the Supreme Court of Michigan conflicts with the supremacy clause, article 6, clause 2, of the Constitution of the United States by permitting the state to exact a penalty from an attorney for exercising the perogatives of federal practice in prosecuting an action in federal court.

III Whether Appellant was denied the due process guarantees of the Fourteenth Amendment during the administrative proceedings.

A. Whether due process is offended by a procedure whereby a litigant is denied the opportunity to call a witness on his own behalf where state law does not prohibit him from calling that witness.
B. Whether due process is offended by procedures whereby a litigant seeking to establish the grounds for disqualification of the decision-maker is precluded from the inquiry necessary to establish the basis of the disqualification motion.
C. Whether due process requires that findings of fact be vacated where the decision-maker improperly receives and considers edited transcripts of prior testimony.

STATEMENT OF THE CASE

Appellant specializes in the trial practice of admiralty law and personal injury litigation. His professional interest in admiralty dates back to the time when he was a high school dropout who sailed the seas in the Merchant Marine during World War II. He later returned to sea periodically to finance his education through the completion of law school at age 33. Having undertaken some forty-five foreign voyages, he returned to Michigan after graduation and set up a maritime law practice.

Since that time, he has written and lectured on maritime law and the law of small boat owners. As a practitioner, his unorthodox trial approach has resulted in the development of novel theories of liability and damage which have resulted in record-setting jury verdicts. Recently, he prevailed on behalf of an injured seaman in this Court. *Vella* v *Ford Motor Co.*, 421 US 1; 95 S Ct 1381; 43 L Ed 2d 682 (1975).

A water tunnel being constructed beneath the navigable waters of Port Huron exploded in December, 1971, killing and wounding numerous workers. A few days after the explosion, Appellant was retained by Raymond Woods, the father of one of the victims, to prosecute a damage action against those responsible for his son Walter's death. The aftermath found Appellant suspended for the practice of law for two years.

Under the applicable state procedure, the State Bar Grievance Administrator, Richard Senter, commenced proceedings against Appellant preferring four charges of professional misconduct, all under the Disciplinary Rules pertaining to the recommendation of legal employment. Two hearings were held; the first aborted, the second completed. The aborted hearing is not itself germane to this appeal, the state court having concluded that those proceedings could not support any findings of misconduct. What is germane is the fact that the hearing panel at the completed hearing considered as substantive evidence edited transcripts of the first hearing.

Upon review, the Michigan Supreme Court concluded that consideration of the edited transcripts failed to comport with "fundamental fairness" and state law, but declined to set aside those findings which resulted in the discipline imposed. Finding evidentiary support for two findings of misconduct, the state court dismissed Appel-

lant's contention that consideration of the transcript by the hearing panel denied him due process. The court then affirmed the findings of misconduct and affirmed a two year suspension.

During the administrative hearing, counsel for the Appellant moved for the disqualification of the hearing panel. For purposes of establishing grounds for disqualification, he sought to question the members. In addressing Appellant's contention that it was error to deny him the right to question the hearing panel, the state court refused relief on the ground that Appellant had failed to adequately demonstrate grounds for disqualification.

Appellant's suspension was based on findings that he had violated DR 2-103(A) and 2-103(C) in two particulars. The first charge is one that Appellant has always readily admitted. He requested Robert J. McLaughlin, business agent for the laborer's union to which his client's son belonged prior to his untimely death, to join the union and affected members as parties plaintiff in a lawsuit. The suit was to be in the nature of a class action and sought, by writ of mandamus, to compel the Coast Guard to investigate the cause of the tunnel explosion. When joinder was not forthcoming, the suit was filed in the United States District Court for the Eastern District of Michigan, Southern Division, in the name of Mr. Woods alone.

When he was retained by Raymond Woods to seek damages for the death of Walter, Appellant decided to seek the investigative expertise of the Coast Guard. He had previously succeeded in obtaining an order from the federal district court in Ohio compelling a Coast Guard investigation in the unrelated SS Roger Blough case.

After being retained by Mr. Woods, but before suit was filed, Appellant telephoned McLaughlin, the business agent

for the laborer's union to which the deceased had belonged, to arrange a meeting to discuss the prospect of union joinder in the mandamus action. A meeting was arranged and held that evening in Port Huron. Appellant brought with him an associate, Marilyn Jean Kelly. McLaughlin, on his own, brought along a priest and other union members. The other members were present to advise McLaughlin. None had claims arising out of the explosion.

The cause of the accident then being unknown, the Governor of the State of Michigan had quickly closed access to the tunnel to all persons and had appointed a "blue ribbon task force" to investigate. The committee included members of firms and organizations involved in the tunnel construction which were ultimately named as defendants in the civil actions that followed.

The Capital Dredge and Dock Company was one of those companies. It was engaged, at the time of the explosion, in drilling from a rig through navigable waters of Lake Huron beneath the lake and the subterranean strata, on into the crown of the tunnel. With that activity on navigable waters of the United States and with a tender along with a barge mounted with a drilling rig to perform the task, it was the judgment of Appellant that the cause of the explosion likely would have been the drilling operation. He was concerned that the task force put together by the governor would frustrate meaningful efforts to get to the cause of the explosion because of their inexperience as an investigative body and because of the built in conflict of interest of its members. Since the activity causing the explosion emanated from afloat a vessel on navigable waters of the United States, Appellant contended that it was maritime in nature. Accordingly, because the Coast Guard is designated by Congress to investigate major catastrophes

of a maritime nature, he was convinced that the Coast Guard was superior in expertise and facilities in conducting such a meaningful investigation.

Appellant explained his belief that the explosion was within the maritime jurisdiction of the Coast Guard and told those assembled that he would be filing a mandamus action on behalf of Woods to compel an investigation and then he further explained his concern that the state investigative agencies would not make an adequate investigation and might be inclined to cover up the cause of the explosion. He further said that he felt that it was imperative to move with dispatch and strength in bringing pressure upon the United States Coast Guard to take charge and conduct an investigation of the catastrophe.

He told McLaughlin, the business agent, that the union had standing in and of itself to join in the mandamus action as did the victims and survivors of victims. Accordingly, he asked for McLaughlin's assistance in securing the joiner of the union and of individuals who were affected by the explosion.

Appellant assured McLaughlin and his colleagues that the undertaking would not bear expenses upon them. He offered to vindicate the union's interests for free since he was already committed to the necessary work on behalf of Mr. Woods, his client.

The other charge against Appellant, arising out of the same meeting, was that he had asked McLaughlin to recommend his employment to those having claims arising out of the explosion. Notwithstanding Appellant's denials, this charge was upheld on the basis of snatches from the testimony of McLaughlin and Kelly. She testified in pertinent part that she observed Appellant's business cards and sample contracts on a table, but did not know who put

them there. Others at the meeting who appeared as witnesses denied seeing them on the table.

The decision of the state court was not based at all on the testimony of McLaughlin when directly asked if Appellant had requested McLaughlin to refer injury cases to Appellant.

> "Q. Okay, but he didn't ask you? He didn't come up and say, Hey, will you get me some clients, did he?
> A. No.
> Q. Okay. He didn't come up to you and say, Hey, I'm in the business of representing these people who were hurt in the tunnel and I want you to get me some clients, did he?
> A. No."
>
> • • •
>
> "Q. He was not selling the proposition that someone hire him to collect for the death of someone, was he?
> A. No.
> Q. Okay. Now in the process you asked Mr. Jaques, did you not, you asked him — pardon me, you told him that you were looking for a good man to represent your people?
> A. Right."

Instead, the Michigan Supreme Court affirmed the administrative board on the basis of testimony that McLaughlin told Appellant that most of the families had not retained an attorney and that McLaughlin was looking for one to recommend to "my people." McLaughlin asked for and received from Appellant some fee contracts, whereupon McLaughlin later looked them over, put them away in a desk drawer, then destroyed them all the following May. McLaughlin also asked Appellant for some business cards and when plaintiff gave them to him he told Mc-

Laughlin he could meet with his people and pass them out if he wanted to. While the state court opinion does not reflect it, the record makes it clear that the disrtibution of cards and form contracts to McLaughlin was at the request of McLaughlin himself.

During the course of the administrative proceedings, Appellant subpoenaed Eugene LaBelle, counsel for the Grievance Administrator. When required to make an offer of proof, Appellant's counsel explained that he wished to examine LaBelle as to whether any promises of leniency had been made to Kelly. Despite reliance by the administrative board on her testimony, and despite recitation of her testimony in the majority opinion of the state court, the court held that Appellant had not been denied due process by the quashing of the subpoena and his resultant inability to impeach a witness for the Administrator. In reaching that result, the court acknowledged that there existed no state grounds precluding the offered testimony. It was apparently believed that due process was simply not offended by Appellant's inability to offer testimony on his behalf.

THE QUESTIONS ARE SUBSTANTIAL

I

On their face, and as construed, the Disciplinary Rules, as applied to Appellant, are impermissibly overbroad and infringe on the freedoms of speech and to peaceably assembly for the redress of grievances in violation of the First Amendment and Due Process Clause.

Freedom of Association

The issues presented in this case include the question of whether a lawyer may be disciplined for giving business cards and form contracts to a union business agent seek-

ing counsel to represent the union members and their families with the understanding that, if he wished to, the business agent could give the cards to others. The First Amendment's associational guarantees authorized the laborers to select McLaughlin as their spokesman. *Brotherhood of Railroad Trainmen* v *Virginia,* 377 US 1, 6 (1964). In that capacity, McLaughlin was constitutionally entitled to seek counsel to recommend to the members and their families. *NAACP* v *Button,* 371 US 415 (1963); *United Mine Workers of America, District 12* v *Illinois State Bar Association,* 389 US 217 (1963); *Brotherhood of Railroad Trainmen, supra; United Transportation Union* v *State Bar of Michigan,* 401 US 576 (1971).

Thus, the issue presented is whether the attorney who attempts to cooperate with a union's protected efforts to seek counsel is himself engaged in protected activities when he gives to the business agent, at the request of the agent, form contracts and cards. In *Brotherhood of Railroad Trainmen, supra,* this Court recognized that an attorney sharing the organizational goals of the union was himself enshrouded in the First Amendment's guarantees of free association. "The railroad workers by recommending competent lawyers to each other, obviously are not themselves engaged in the practice of law, *nor are they or the lawyers they select parties to any soliciting of business*" 377 US at 6-7; emphasis supplied. "[L]awyers accepting employment under this Constitutionally protected plan have a like protection which the State cannot abridge." 377 US at 8. Even the dissent in *United Transportation Union, supra* recognized that "nothing in our prior decisions approved the solicitation of business *except in so far as the solicitation may be correlative to the rights of clients.*" 407 US at 597; emphasis supplied.

In *NAACP* v *Button, supra,* the Court specifically addressed the contention that the State could forbid an attorney from distributing form contacts in the context of an organization and attorney uniting their forces to secure the redress of grievances through litigation. There it was held that "the activities of the NAACP, its affiliates and *legal staff* shown on this record are modes of expression and association protected by the First and Fourteenth Amendments which [the State] may not prohibit, under its power to regulate the legal profession". 371 US at 428; emphasis supplied. The state court's decision, then, squarely conflicts with the decisions of this Court. Those decisions, with equal force, preclude the State from impeding union joinder, as co-plaintiff, in litigation necessary to vindicate the mutual interests of the union and Appellant's client.

Overbreadth

DR 2-103 was interpreted by the state court as precluding an attorney, in all imaginable circumstances, from advising laymen as to their rights and offering free representation. In the federal court system, this view of the Disciplinary Rules has been rejected. *In re Ades,* 6 F Supp 467, 475 (DC Md, 1934). Bar associations have themselves undertaken programs offering free representation to persons alleging that they have been victimized by usury. *Gunnels* v *Atlanta Bar Association,* 191 Ga 366; 12 SE 2d 602; 132 ALR 1165 (1940). Additionally, the ABA's Committee on Professional Ethics and Grievances has upheld plans whereby lawyers advise laymen of their views on the constitutionality of legislation and offer free representation to those aggrieved by such legislation. Opinion 148, Opinions of the Committee on Professional Ethics and

Grievances, American Bar Association, 308-312 (1957), reported in *NAACP* v *Button, supra,* footnote 19.

In re Ades, supra, makes it clear that Plaintiff is neither the first nor most renowned attorney to have offered his services free. Others include Andrew Hamilton, Alexander Hamilton, and Clarence Darrow. Offers by attorneys of free representation have been accepted in the 1734 libel case of John Peter Zenger, the Dred Scott Case, and Scopes Trial, and Scottsboro Case, *Powell* v *Alabama,* 478 US 45; 53 S Ct 55; 77 L Ed 158 (1932) and Aaron Burr's treason trial.

One is referred to *Great American Lawyers,* W. Lewis ed, 1907, Vol V, pp 477-478. Joseph Jefferson, an actor, told a story of how, when his father's theater company was faced with having to close because of a prohibitive license fee, Abraham Lincoln

> "Called on the managers and offered, if they would place the matter in his hands, to have the license revoked, declaring that he only desired to see fair play, and would accept no fee whether he failed or succeeded."

As to the other charge against Appellant, the state court construed the Discipilinary Rule as prohibiting an attorney from complying with consumer requests for fundamental information as to the availability of legal services. Consider the following. A satisfied client is desirous of securing competent representation for friends and relatives. He asks the attorney if he handles certain legal matters and, if so, whether the charge for such services is on an hourly basis. He asks for business cards so that, if the need for legal services should arise, he can distribute the cards to his friends and relatives to the end that his friends and relatives may contact the attorney with the possibility of consummating

a mutually beneficial attorney-client relationship. Those facts, which parallel the instant case in all pertinent respects, would subject to banishment the lawyer daring enough to comply with the request.

Effectively, the ban imposed by the State would frustrate even the protected associational efforts of a union set forth above. As a result, the regulation snares in the web of its application those engaged in protected activities as well as those whose conduct might properly be circumscribed. Thus, the statute lacks the requisite specificity required of regulations touching upon our most precious freedoms. As such, it has the objectionable qualities of tolerating improper application against those engaged in the exercise of rights conferred by the First Amendment and chilling the exercise of those rights. Since the existence of DR 2-103, as construed, affronts the free speech rights of all citizens, it is invalid on its face whether or not Appellant's conduct might properly be regulated by more narrowly drawn legislation. *NAACP* v *Button, supra; Bigelow* v *Virginia,* 421 US 809, 815-816 (1975).

Free Speech

Plaintiff's vigorous advocacy of a legitimate lawsuit is protected by *NAACP* v *Button, supra.* He was entitled to participate in the free flow of information as to the availability of federal relief. *NAACP* v *Button, supra; Brotherhood of Trainmen, supra; United Transportation Union, supra.* He was also entitled to share with McLaughlin the elementary information contained on his business cards and the fact that personal injury litigation customarily does not require the consumer of legal services to obligate himself to an hourly fee or retainer. *Bates* v *State Bar of Arizona,* .... US ....; 97 S Ct 2691; 53 L Ed 2d 810 (1977).

The state may not suppress the dissemination of truthful information. *Virginia Pharmacy Board* v *Virginia Consumer Council,* 425 US 748 (1976); *Bigelow* v *Virginia,* 421 US 809 (1975). Where, as here, the information was given to a willing listener, the protection is afforded to the *communication. Virginia Pharmacy Board, supra,* 425 US 748, 756. Those protections may be invoked by the speaker, *Bigelow,* or the recipient, *Virginia Pharmacy Board.*

As to the charge that Appellant advised McLaughlin regarding joinder and offered free representation, the State's regulation is based on the implicit "notion that it is always better for a person to suffer a wrong silently than to redress it by legal action". This assumption was expressly rejected in *Bates* v *State Bar of Arizona, supra.* No compelling state interest is served by erecting barriers to access to federal courts conferred by the United States Constitution with maritime jurisdiction.

As to the charge that Appellant can be forbidden from following his chosen profession for complying with the request of McLaughlin for cards, there is, as well, no compelling state interest in requiring that result. Most of the traditional justifications for such regulations were put to rest in *Bates.* Indeed, it is impossible to recognize any persuasive distinction between *Bates* and this case, for in both the attorney is simply making known the information such as office address set forth on a card, and in each the consumer is afforded the basic information necessary to make an informed decision as to the retention of counsel.

If any distinction exists, it is in the prospect that "direct solicitation" may provide direct pressures on unwilling consumers. The *Bates* Court intimated as much reserving the narrow "problems associated with in-person solicitation of clients—at the hospital room or the accident site,

or in any other situation that breeds undue influence—by attorneys or their agents or 'runners'." 53 L Ed 2d 810, 825. Yet even if one were to conclude that imposing on unwilling consumers presents some danger, that rationale is wholly inapplicable to this case, where the only communication emanating from Plaintiff was to McLaughlin, unquestionably, a *willing* listener. *Cohen* v *California,* 403 US 15, 21 (1971).

The state cannot foreclose the exercise of constitutional rights by the label "solicitation". Nor may it justify the blanket prohibition here imposed without showing a compelling state interest in forbidding the precise speech here involved. As no such compelling interest exists, the Disciplinary Rules in issue are unconstitutional as applied to Appellant. *NAACP* v *Button, supra.*

II

The decision by the Supreme Court of Michigan conflicts with the supremacy clause, Article 6, Clause 2, of the Constitution of the United States by penalizing an attorney for the exercise of the prerogatives of federal practice in seeking a federal forum to compel a Coast Guard investigation.

The relative importance to the State of its own law is not material when there is a conflict with federal law, as Article 6, Clause 2 provides that federal law must prevail. *Free* v *Bland,* 369 US 663, 666 (1962). State law, to withstand scrutiny under the supremacy clause, must comport with regulations promulgated by the Secretary of the Treasury, *Free* v *Bland, supra,* as well as the Federal Rules of Civil Procedure, *Wilson & Co.* v *Packinghouse Workers,* 83 F Supp 162, 167 (SD NY, 1949). Where an inconsistency between state and federal law exists, the state regulation

must fall, even if the state, in passing its law, had in mind some purpose other than the frustration of federal law. *Perez* v *Campbell,* 402 US 637, 651-652 (1971); *Nash* v *Florida Industrial Commission,* 389 US 235, 240 (1967). The federal interest is particularly acute in areas touching the exercise of civil rights conferred by the United States Congress. *Hamm* v *Rock Hill,* 379 US 306 (1964).

Sperry v *Florida,* 373 US 379 (1963) is directly on point. There it was held that a federal license to practice (before the Patent office in *Sperry*) conferred upon the licensee the right to engage in reasonable and necessary practices in the exercise of the rights conferred by the federal government. 373 US at 386. The state's interest in regulating the practice of law within its borders must fall where the state regulation conflicts with federal authorization, *id.* at 384, for "no state law can hinder or obstruct the free use of a license granted under an Act of Congress". 373 US 379, 385.

In the instant case, Appellant, in the exercise of the rights inhering in his license to practice law in federal court, determined on behalf of his client that an action to compel a Coast Guard investigation was necessary to protect his client's interests. He also made the judgment that relief might more readily be forthcoming if the court could be shown the substantial interest by *all* concerned. Two alternatives existed, a class action in the name of Woods or direct joinder by numerous co-plaintiffs in the suit.

Under the Federal Rules of Civil Procedure, a class action is an extraordinary suit, as it may conclusively determine the rights and obligations of persons not parties thereto. As a prerequisite, Rule 23(a) compels an attorney to show the court that "the class is so numerous that joinder of all members is impracticable". In a case such

as the mandamus action, counsel for the plaintiff, to fulfill his ethical obligations to the court, must attempt to ascertain the number of class members and attempt the preferable procedural device of joinder. Only if those efforts fail can he candidly represent that joinder is impracticable. Since state law imposes punishment on one licensed to practice law in federal courts for conduct in the prosecution of a federal lawsuit, those regulations contravene the supremacy clause where, as here, the conduct is facially permitted, if not required, by Rule 23(a) of the Federal Rules of Civil Procedure.

III

The Due Process Clause of the Fourteenth Amendment is offended by state procedures whereby one is deprived of the license to practice law in proceedings where he is denied the right to call a witness on his own behalf, the right to procedures necessary to establish grounds for disqualification of the hearing tribunal and where he is adjudged guilty through consideration of edited transcripts of prior testimony as substantive evidence.

An American citizen's right to follow his chosen profession is the very essence of personal liberty, and that right is a liberty interest protected by the Fourteenth Amendment. *Greene* v *McElroy,* 360 US 474, 492 (1959). In particular, the license to practice law is a liberty interest within the ambit of the due process clause such that the state may not exclude one from the practice in the absence of procedures consistent with those required by the Fourteenth Amendment. *Schware* v *Board of Bar Examiners,* 353 US 232, 238-239 (1957); *Willner* v *Committee on Character and Fitness,* 373 US 96, 103 (1963). It is of no constitutional significance that the state purports to act

through its highest court rather than through its legislature. *Konigsberg* v *State Bar of California,* 366 US 36, 45 (1961).

Here, Appellant was precluded from calling Mr. LaBelle as a witness on his behalf to establish promises of leniency made to Marilyn Jean Kelly. Those promises are relevant to the credibility to be afforded her testimony. *Napue* v *Illinois,* 360 US 264 (1959), *Giglio* v *United States,* 405 US 150 (1972). See also 3A Wigmore, Evidence (Chadbourn rev) §§948-949, pp. 783-792; McCormick, Evidence (2d ed), §40, pp. 78-80. Due process requires that a lawyer facing disciplinary action be afforded an opportunity to establish his defense. *Re Ruffalo,* 390 US 544, 550 (1968). The right to compulsory process, enshrined in the Sixth Amendment, is inherent in the concept of due process and is thereby binding on the states through operation of the Fourteenth Amendment. *Washington* v *Texas,* 388 US 14 (1967). Procedures, such as those employed in the state administrative hearing, which deprive one of property without an opportunity to present defense witnesses, do not measure up to the high standards of the Due Process Clause.

The effect of denying Appellant the opportunity to adduce the testimony of LaBelle is to deprive him of the means necessary to effectively confront and cross-examine Kelly. Confrontation is a fundamental element of due process even in state efforts to terminate welfare benefits, *Goldberg* v *Kelly,* 397 US 254 (1970). State procedures for the denial of a license to practice law are constitutionally infirm in the absence of the right to confront and cross-examine witnesses produced by one's adversary. *Willner* v *Committee on Character and Fitness, supra.*

Moreover, evidentiary rules which operate to deprive a litigant of the means necessary to sustain his defense are

violative of due process guarantees. *Ferguson* v *Georgia,* 365 US 570 (1961); *Chambers* v *Mississippi,* 410 US 284 (1973). See also *United States* v *Nixon,* 418 US 683 (1974) and the plurality opinion of Justice Marshall in *Jenkins* v *McKeithen,* 395 US 411 (1969). Lest there be any question that the applicable Constitutional guarantees apply to this civil-denominated proceeding, and lest there be any question of whether denying Appellant the opportunity to present his defense can withstand scrutiny under the Fourteenth Amendment, the Court is referred to *Bowman Transportation, Inc.* v *Arkansas Best Freight System, Inc.,* 419 US 281, 288, fn 4 (1974), "Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation". At the very least, therefore, this appeal presents the substantial question of whether quashing the subpoena issued by Appellant denied his due process of law.

An identical conclusion must be reached in reviewing the state court's opinion that Appellant was not entitled to question the administrative tribunal sitting in judgment. It is clear that Appellant was entitled to have his hearing conducted before an unbiased tribunal. *Withrow* v *Larkin,* 421 US 35 (1975). While recognizing this right, the state court concluded that procedural due process did not require affording Appellant a procedure necessary for the implementation of his substantive right to an unbiased tribunal.

In *Watkins* v *United States,* 354 US 178 (1957), the petitioner was convicted of contempt of the House Un-American Activities Committee (HUAC). During the course of the administrative proceedings, he was denied the opportunity to question the committee as to the pertinency of the investigation. In that quasi-criminal proceeding [as are

Michigan bar disciplinary proceedings, *State Bar* v *Woll,* 387 Mich 154; 194 NW 2d 835 (1972)], this Court held that the failure to permit the petitioner to inquire of the investigators violated due process.

Similarly, in *Wheeler* v *Montgomery,* 397 US 280 (1970), this Court considered issues presented by recipients of old age benefits. Recognizing a property of liberty interest comparable to that here involved, it was held that the denial of a necessary evidentiary hearing offended the principles embodied in the due process clause. Where a right exists, here the right to an unbiased tribunal, the State cannot deprive a citizen of the procedural means necessary to enforce that right. See *Poindexter* v *Greenbow,* 114 US 270 (1885).

Finally, the state court recognized that "fundamental fairness" was offended by the hearing panel's review of edited transcripts of testimony presented at the truncated hearing. Given the acknowledged denial of "fundamental fairness", the first essential of due process, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt". *Chapman* v *California,* 386 US 18, 24 (1967). The state court itself was unable to declare that belief, being wholly silent on the point. Under *Chapman,* the inability of the state court to make the requisite finding compels this Court to conclude that it was reversible error for the state to affirm the results of a hearing where self-admitted denials of due process took place.

Moreover, the facts of this case belie any contention that the error have been deemed "harmless beyond a reasonable doubt". Despite the denials by McLaughlin that he was asked to recommend Appellant's employment, the state based its decision on that very testimony. Can it be said

beyond a reasonable doubt that perusal of McLauglin's prior testimony had no effect on the credibility afforded his testimony? Certainly not when the factors upon which the state relied were contradicted by Appellant himself. We know that the hearing panel relied exclusively on the transcripts in finding Appellant guilty of two charges of misconduct which were vacated by the Michigan Supreme Court. It cannot be declared with the requisite certainty that the denial of due process inhering in the use of the transcripts did not affect the view of Appellant taken by the hearing panel. Indeed, that conclusion is the only sustainable result since the state itself was unable to find the conceded denial of due process to be harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal, or, in the alternative, grant a writ of certiorari to review the judgment below.

Respectfully submitted,
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RYAN, J. Appellant Leonard C. Jaques appeals as of right the State Bar Grievance Board's order affirming imposition of a three-year suspension of his privilege to practice law, plus payment of costs ordered by a hearing panel.

The complaints filed against Mr. Jaques by the Grievance Board charged him with violating former Canon 28 of the Canons of Professional Ethics, Canon 2, DR 2-103(A) and DR 2-103(C); DR 2-104(A)(5); and DR 2-105(A) of the Code of Professional Responsibility[1] and Rule 15, § 2(2); 15, § 2(3) and 15, § 2(4) of the Supreme Court Rules relating to the State Bar of Michigan.[2] It was alleged that Mr. Jaques personally and through the employment of others sought to and did solicit victims and survivors of the December 11, 1971 Port Huron tunnel explosion and that he personally urged certain persons to bring a lawsuit to compel an inquiry into the cause of the explosion.[3]

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[1] Canon 2 and the enumerated Disciplinary Rules of the Code of Professional Responsibility associated with it provide as follows:

Canon 2: "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."

DR 2-103: "Recommendation of Professional Employment.

"(A) A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a nonlawyer who has not sought his advice regarding employment of a lawyer.

* * *

"(C) a lawyer shall not request a person or organization to recommend employment, as a private practitioner, of himself, his partner, or associate, except that he may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists and may pay its fees incident thereto."

DR 2-104: "Suggestion of Need of Legal Services.

"(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

* * *

"(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the

joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder."

[2]State Bar Rule 15 provides in relevant part:

Sec. 2. "Grounds for Discipline in General.

"The following acts or omissions by a member of bar of this State, individually or in concert with any other person or persons, shall constitute misconduct and shall be grounds for discipline whether or not the act or omission occurred in the course of an attorney-client relationship.

* * *

"(2) Conduct that exposes the legal profession or the courts to obloquy, contempt, censure or reproach;

"(3) Conduct that is contrary to justice, ethics, honesty or good morals;

"(4) Conduct that violates the standards or rules of ethics or professional responsibility adopted from time to time by the Supreme Court of this State."

[3]The specific charges on which findings were eventually made were set forth in two complaints. The first formal complaint charged:

"That on or about December 13, 1971, respondent personally arranged to meet Robert J. McLaughlin, Jr., business agent for Local 463 of the Laborers International Union of North America and did so meet with McLauglin on said day and date for the stated purpose of obtaining McLaughlin's assistance, as an officer of said union, in soliciting the victims and/or survivors of victims of a tunnel explosion at Port Huron occurring December 11, 1971.

"That McLaughlin personally, and as an officer of said union refused to endorse respondent as an attorney recommended to said victims and/or survivors by him or the local union.

"That thereafter, from on or about December 13, 1871 to on or about February 1, 1972, and on frequent occasions in the interim respondent, individually and in concert with Edward Paige and/or William Rounsoville solicited or caused to be solicited the personal and/or derivative claims, and/or contemplated personal and/or derivative claims of the victims and/or survivors of said victims of said explosion, to wit:

(1) Mrs. Johanna Larets;
(2) Mrs. Maddelin Williams; [*sic*]
(3) Mrs. Rose Woolstenhulme;
(4) Mrs. Sue Curtis;
(5) Mrs. Maggie Epperson;
(6) Mrs. Judy A. Hardel;
(7) Francis M. Hamricks;
(8) Olin Hamricks, Jr.; and
(9) Joyce Simkins (Mrs.)

"That the foregoing violated Code of Professional Responsibility DR 2-103(C); DR 2-104(A)(5); and DR 2-105(A) and the Supreme Court Rules relating to the State Bar of Michigan."

This case is before us following lengthy proceedings below. A request for investigation and then a formal complaint were served upon Mr. Jaques in the first half of 1972, more than five years ago, following a general investigation of allegations of misconduct arising out of the tunnel explosion. The matter was assigned to Wayne County Hearing Panel No. 17 which heard the testimony of six witnesses. Appellant then offered to plead nolo contendere to charges as amended by an oral stipulation and his plea was accepted. The panel ordered a one-year suspension from practice.

The State Bar Grievance Board eventually set aside appellant's plea and remanded to Hearing Panel No. 17 to complete the formal hearing to the conclusion of the testimony. Two months prior to the filing of the board's order a second request for investigation was served on Mr. Jaques and it was followed by a second formal complaint. The two complaints were consolidated for trial and assigned to Hearing Panel No. 12, Panel No. 17 having disqualified itself. Panel No. 12 was thereafter also disqualified and the

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The second formal complaint alleged:

"That on or about December 15, 1971, respondent met with Robert J. McLaughlin, business agent of Local 463 of the Laborers Union at Port Huron, Michigan, and did, then and there:

"(a) Volunteered advice to said McLaughlin to bring a lawsuit or lawsuits on behalf of said union for the purpose of precipitating an inquiry into the causes of an explosion in a tunnel being constructed in the vicinity in which members of said union were employed at the time of said explosion;

"(b) Sought to persuade said McLaughlin to act on behalf of respondent to solicit and/or seek out survivors of said explosion and/or next of kin of victims of said explosion for the purpose of employing respondent as their attorney to prosecute any and all compensation or personal injury claims of said victims and/or their next of kin.

"That said conduct is in violation of former Canon 28 of the Canons of Professional Ethics, Canon 2, DR 2-103(A) and (C) of the Code of Professional Responsibility and Rule 15, § 2(2)(3) and (4) of the Supreme Court Rules relating to the State Bar of Michigan."

case was reassigned to Hearing Panel No. 2. The members of Panel No. 2 were furnished an edited transcript of the testimony and exhibits produced at the earlier, truncated hearing. Panel No. 2 then heard ten more days of testimony during the period between October 1974 and May 1975 and entered an opinion and an order of discipline. The State Bar Grievance Board affirmed the findings and modified the order of discipline only as to the amount of costs.

Mr. Jaques appeals the findings below, asserting nine instances of error which raise essentially the following three issues:

1. Whether Mr. Jaques was afforded a fair hearing in accordance with the applicable rules;

2. Whether it is unethical to solicit persons to join in a class action which has not yet been filed; and

3. Whether the findings of misconduct are supported by the evidence.

I

Mr. Jaques claims the hearing afforded him was defective because: Hearing Panel No. 2 merely read the transcripts but did not hear the testimony of witnesses who appeared before Panel No. 17; the State Bar Grievance Administrator did not call all res gestae witnesses to the alleged misconduct; the hearing panel quashed a subpoena of counsel for the State Bar Grievance Administrator, denying appellant's alleged right to call and examine him; the hearing panel did not conduct itself as an impartial arbiter; and, finally, the formal complaint gave insufficient notice of the charges.

Due process is the underpinning of these allegations of error. What we are concerned with, then, is that Mr. Jaques

must have been afforded a fair hearing as well as one conducted in accordance with the rules adopted by this Court.

A good deal of appellant's argument is put to us by way of analogy to criminal cases. We have long recognized that discipline and disbarment proceedings are quasi-criminal in character. *State Bar of Michigan* v *Woll*, 387 Mich 154; 194 NW2d 835 (1972). In light of that recognition we have imposed some of the same safeguards applied in criminal proceedings to grievance procedures for the protection of attorneys faced with charges of professional misconduct. For example, we have held that the allegedly errant attorney has a right to cross-examine witnesses, *State Bar of Michigan* v *Murphy*, 387 Mich 632; 198 NW2d 289 (1972), and to be fairly and specifically informed of the charges against him, *State Bar Grievance Administrator* v *Freid*, 388 Mich 711; 202 NW2d 692 (1972).

It is important, however, to remember that we are dealing with the disciplinary procedures of the State Bar of Michigan. As Justice Levin said in concurring in *State Bar Grievance Administrator* v *Estes*, 390 Mich 585, 602; 212 NW2d 903 (1973), "the Grievance Board is part of the administrative structure of this Court". The State Bar Rules "shall be liberally construed for the protection of the public, the courts and the legal profession". State Bar Grievance Rule 16.34(d).

In the State Bar Rules and in previous cases we have accordingly approved variances between disciplinary proceedings and the rigorous standards applied in the trial of criminal cases. We impose discipline if misconduct is proven by a preponderance of the evidence. *State Bar Grievance Administrator* v *Jackson*, 390 Mich 147; 211 NW2d 38 (1973); Grievance Rule 16.13. The cases are tried before

panels of lawyers and the applicable rules provide that hearings are to be conducted in the same fashion as civil trials in nonjury cases.

It is fundamental that Mr. Jaques, as an attorney whose privilege to practice law is at stake, is entitled to a full and fair hearing. We do not believe, however, that we must apply the law of criminal trials to disciplinary proceedings at every turn.

"Due process * * * is a term that 'negates any concept of inflexible procedures universally applicable to every imaginable situation.' *Cafeteria Workers* v *McElroy*, 367 US 886, 895 [81 S Ct 1743; 6 L Ed 2d 1230] (1961). Determining what process is due in a given setting requires the Court to take into account the individual's stake in the decision at issue as well as the State's interest in a particular procedure for making it." *Hortenville Joint School Dist No. 1* v *Hortenville Education Association*, 426 US 482, 494; 96 S Ct 2308; 49 L Ed 2d 1 (1976).

Having said this much, we proceed to consider the individual allegations of error.

A.

We first hold that the hearing panel erred in receiving and considering as substantive evidence the edited transcript of the testimony of the witnesses who appeared before Panel No. 17. We need go no further than the State Bar Rules to reach this conclusion, although even without the rule our notion of fundamental fairness leads to the same conclusion.

Rule 16 of the State Bar Rules created the State Bar Grievance Board as an arm of this Court for the discharge of our exclusive constitutional duty to supervise the State

Bar. Rule 16 and the associated Procedural and Administrative Rules prescribe the conduct of hearings on complaints issued by the State Bar Grievance Administrator. State Bar Rule 16 assigns to hearing panels the duty of holding public hearings, making findings of fact and ordering discipline, and requires that their actions be reported to the State Bar Grievance Board. Grievance Rule 16.3 provides that two members of the panel constitute a quorum and that action shall be by vote of a majority. Grievance Rule 16.10 allows the board to "reassign a complaint when the hearing panel fails to convene or complete its hearing within a reasonable time".

The Grievance Administrator argued and the hearing panel agreed that when a case is reassigned it is not necessary to hear anew the testimony of witnesses who had appeared at an earlier hearing before the first panel. Under the circumstances present in the instant case, we disagree.

Although the rules contemplate the reassignment of cases, Grievance Rule 16.3.3(b) is also relevant. It provides that hearing panels shall "[r]eceive evidence and make written findings of fact". We believe the directive of Grievance Rule 16.3.3(b) establishes a preference for the hearing panel that makes the initial findings of fact to likewise receive the testimony of witnesses. Where, as in the case at bar, the demeanor of witnesses may be an important factor in the resolution of disputed facts, Grievance Rule 16.3.3(b) controls and, absent an agreement to the contrary, the hearing panel to which a case is reassigned may not simply consider the record testimony of the witnesses who have appeared and resume the hearing where the former panel left off. See generally, 2 Davis, Administrative Law Treatise, § 11.18.

Our holding assures that where conflicting testimony must be resolved, a quorum of a hearing panel will personally hear and observe all the witnesses whose testimony is to be considered unless the Grievance Administrator properly establishes justification for their non-appearance, as for example where a witness is shown to be unavailable and his testimony is therefore admissible under the former testimony exception to the hear-say rule.

Of the six witnesses who testified at the hearing before Panel No. 17 in the instant case, three did not appear at the second. Appellant did not agree to the second panel's consideration of their recorded testimony and the Grievance Administrator's belated attempts to argue their unavailability do not satisfy the requirements of our case law for the use of former testimony. See *Rotter* v *Detroit United Railway,* 217 Mich 686; 187 NW 271 (1922); *Karwick* v *Pickands,* 181 Mich 169; 147 NW 605 (1914).

Hearing Panel No. 2 found that Mr. Jaques violated disciplinary rules in four instances, which for the sake of convenient reference we characterize as findings I, II, III and IV, to wit:

I. That Mr. Jaques personally solicited the local laborer's union and some of its members to join in a class action Mr. Jaques was planning to file to compel the Coast Guard to investigate the tunnel explosion, in violation of DR 2-103(A) and DR 2-103(C). See also DR 2-104(A)(5).

II. That Mr. Jaques requested the agent for the local union, Robert J. McLaughlin, to recommend him to persons who had claims arising out of the explosion. DR 2-103(C) prohibits a lawyer from requesting another to recommend his employment.

III. That Mr. Jaques visited the home of Mrs. Rose Woolstenhulme, whose husband and grandson died in the explosion, and requested to be employed to represent her in violation of DR 2-103(A).

IV. That Mr. Jaques requested William Rounsoville, steward of the local laborer's union, to recommend him to survivors of victims of the tunnel explosion, violating DR 2-103(C).

Findings III and IV were based in substantial part upon the testimony of the witnesses Rose Woolstenhulme, Madalene Williams and William Rounsoville who appeared before Panel No. 17 but not before Panel No. 2. The State Bar Grievance Board affirmed. For the reasons stated, we reverse those two findings.

The erroneous use by Panel No. 2 of the transcript of the earlier testimony does not, however, vitiate the entire proceeding. See *Withrow* v *Larkin,* 421 US 35; 95 S Ct 1456; 43 L Ed 2d 712 (1975). We reject Mr. Jaques' contention that it does. It was not simply the hearing panel's reading of the transcript which causes us to reverse findings III and IV, but its use as substantive evidence to support those findings. In making findings of misconduct I and II, the hearing panel did not rely upon the challenged transcript, but upon other witnesses the panel did see and hear. The unfairness which resulted from the panel's improper reliance upon the transcript relates to findings III and IV only, and is amply rectified by our reversal of the Grievance Board's findings with respect thereto. In so concluding, we believe appellant's reliance upon *People* v *Ramsey,* 385 Mich 221; 187 NW2d 887 (1971) to be misplaced. *Ramsey* holds that in a criminal nonjury trial the presiding judge may not view the preliminary examination transcript.

That decision is based on MCLA 768.26; MSA 28.1049 concerning the use of former testimony in criminal trials and the policy underlying a court rule requiring, in the absence of consent, that the judge who conducted the preliminary examination should not also try the case.

The requirements of a fair hearing are not technical. Mr. Jaques had a full evidentiary hearing before the hearing panel. The State Bar Grievance Board reviewed the entire record. Mr. Jaques is now before us on an appeal as of right. The members of this Court are bound to review the entire record to determine whether the findings, as affirmed by the Grievance Board, "have proper evidentiary support". *State Bar Grievance Administrator* v *Estes, supra,* 593; *State Bar Grievance Administrator* v *Beck,* 400 Mich 40; 252 NW2d 795 (1977); Grievance Rule 16.24(h). Recognizing Mr. Jaques' substantial stake in the outcome of this case, we believe the procedures afforded him satisfy the requirements of due process. We will, therefore, consider findings I and II and proceed to determine whether those findings have "proper evidentiary support", and whether the hearing afforded Mr. Jaques was otherwise fairly conducted.

B.

Appellant next contends that Grievance Rule 16.5.2(b) which directs counsel for the State Bar Grievance Administrator to "[p]resent all available evidence relating to complaints" imposes upon him the same duty as that imposed upon the prosecutor in a criminal case to produce and examine all of the res gestae witnesses unless their testimony would be cumulative. *Hurd* v *People,* 25 Mich 405 (1872).

The duty to present all res gestae witnesses to a transaction or event has been applied only in criminal cases and, even then, is a duty imposed only upon the people. Its roots are in this Court's historic concern that when the full investigative and prosecutorial power of the state is annoyed with an accused in a criminal case, the people's duty is not met where only such evidence as points toward guilt is produced when there exists other evidence which may suggest innocence. It is a product of judicial policy that the prosecutor may not pick and choose which witnesses will fairly present the whole picture, but requires the production of all witnesses to an alleged crime, leaving it to the trier of fact to decide whether in the totality guilt is proven. We have discovered no authority, and the appellant has invited our attention to none, suggesting the duty to call res gestae witnesses applicable to bar discipline proceedings. We decline to so extend the rule of criminal law.

We do agree, however, that although not bound by the prophylactic rule of criminal law concerning res gestae witnesses, counsel for the Grievance Administrator does have the duty to seek justice and to develop a full and fair record. See ABA Code of Professional Responsibility, Canon 7, Ethical Consideration 7-14 concerning government lawyers.[5]

The Grievance Administrator's duty was satisfied in the instant case. The two remaining charges against Mr. Jaques arose out of one incident. Counsel for the Grievance Administrator presented the testimony of two witnesses to that incident. Appellant called and examined several other per-

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[5] Ethical Consideration 7-14 provides in pertinent part:
"A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record * * *."

sons present on the occasion. We believe the hearing was a fair one in this respect.

C.

The hearing panel quashed a subpoena served by appellant on Eugene LaBelle, counsel for the State Bar Grievance Administrator at the proceedings before both hearing panels. Relying on *People* v *Davis,* 52 Mich 569; 18 NW 362 (1884), and *People* v *Reed,* 393 Mich 342; 224 NW2d 867 (1975), appellant claims he was denied an opportunity to reach material matters. The subpoena here in question was served on Mr. LaBelle in March of 1975, after the hearing panel had heard seven days of testimony.

The reason given for calling Mr. LaBelle was to determine why some res gestae witnesses had not been called; whether any promise had been made to an attorney who was a chief witness against Mr. Jaques and who was associated with him during the period concerned here, that no complaint would be brought against the witness by the administrator in exchange for the testimony; and what conversations, if any, Mr. LaBelle had with other witnesses.

Appellant was afforded an opportunity to confront and cross-examine all of the witnesses against him. His claim, then, is that in the denial of an opportunity to question counsel, he was deprived of a fair hearing. The administrator, an assistant administrator and two investigators did testify before the hearing panel. Although we believe Mr. LaBelle could have testified, we do not believe the action of the hearing panel in quashing the subpoena deprived Mr. Jaques of a fair hearing. We will not extend *Reed, supra,* to disciplinary proceedings.

D.

Appellant next alleges he was denied a fair hearing because the members of the hearing panel were not impartial and because they became "embroiled in the advocacy of the cause".

The allegation consists of several parts. We have already dealt with the effect of the hearing panel having viewed the transcript of the prior hearing. As to the alleged hostility of members of the hearing panel, we have reviewed the record and we are of the opinion that the *conduct* of the panel was entirely fair throughout the lengthy hearing and its members did not improperly examine witnesses. A trial judge may examine witnesses and call witnesses not called by either party. *Nicholson* v *Davis,* 327 Mich 115; 41 NW2d 494 (1950); *Masters* v *Massachusetts Bonding & Ins Co,* 349 Mich 98; 84 NW2d 462 (1957), and neither logic nor cited authority suggests the hearing panel may not do likewise. We must remember the nature of these proceedings and that we liberally construe the rules for the protection of the public, the courts and the profession. Grievance Rule 16.34. Appellant was not prevented from calling or cross-examining any witnesses or from getting important evidence into the record. We believe the record shows appellant's defense was not undermined. See *State Bar Grievance Administrator* v *Beck, supra.*

Appellant also complains of the hearing panel's ruling sustaining objections to questions put to it by his counsel concerning the appointment of members of the panel and possible previous connection with other discipline proceedings. We held in *State Bar Grievance Administrator* v *Baun,* 395 Mich 28; 232 NW2d 621 (1975), that the administrative connection between the Grievance Administrator, the hear-

ing panel and the Grievance Board is sufficiently attenuated so that, without more, the discipline procedures are not inherently defective. Absent specific allegations of facts indicating bias or improper composition of the hearing panel, we perceive no denial of due process. See *Baun, supra.*

Finally in this connection, appellant complains of alleged *ex parte* communications between members of the hearing panel and the grievance administrator. None of the citations to the record show any communications resulting in denial of a fair hearing. We do not believe a miscarriage of justice resulted from advice by counsel for the grievance administrator to members of the hearing panel that the administrator would oppose motions filed by appellant and his brief discussion concerning scheduling of hearing dates with one member, or from a member somehow hearing that appellant had served a subpoena on a potential witness. The members of the hearing panel stated that they had not discussed the merits of the case with counsel. Grievance Rule 16.34 (c). See *Beck, supra.*

E.

Appellant's last due process argument concerns the addition of the second complaint and a claimed variance between the charges of the formal complaint and the findings of the hearing panel. We believe, first, that the complaints fairly informed appellant of the charges and that the findings we review here do not vary from the charges in those complaints. The charges are recited in footnote 3. A more definite statement could have been requested if one was desired and a conference could have been ordered on request to narrow the issues. GCR 1963, 115; Grievance Rule 16.11.

Moreover, we do not believe there was a failure to give advance notice of the charges which would deprive appellant of due process. *In re Ruffalo,* 390 US 544, 550; 88 S Ct 1222; 20 L Ed 2d 117 (1968). Although the second complaint added more explicit detail regarding the charge of solicitation of and through McLaughlin concerning the class action, we believe the factual allegations of the original complaint were sufficient notice of that charge, particularly when the entire complaint is considered. It specified violation of DR 2-104(A)(5) which directly concerns class actions. See footnote 1. Indeed the first hearing opened with argument by counsel for Mr. Jaques that DR 2-104(A)(5) condoned his conduct. The State Bar argued that Mr. Jaques' interpretation of the rule was incorrect. This is not a case of charges being amended in the middle of a hearing to trap an attorney by his own testimony. Compare *Ruffalo, supra.* For the same reason we believe the addition of DR 2-103(A) by the second complaint was not unfair.

Similarly we are not persuaded that continuation of the hearing on the original charges after the Grievance Board allowed Mr. Jaques to withdraw his nolo contendere plea to the stipulated complaint amendments which involved solitication for one survivor, Mrs. Woolstenhulme, and of Robert McLaughlin concerning a class action was unfair. We will not, as appellant requests, extend the principle of *People* v *McMiller,* 389 Mich 425; 208 NW2d 451 (1973), to discipline proceedings.

The principal policy reasons underlying the decision in *McMiller* to prohibit the imposition of charges of a greater offense following successful appeal of a plea-based criminal conviction were two, and were stated as follows:

"Allowing trial on a higher charge following reversal

of a plea-based conviction of a lesser offense would (1) discourage exercise of the defendant's right to appeal a conviction claimed to be based on an improperly accepted plea, and (2) tend to insulate from appellate scrutiny non-compliance with the guilty plea procedure established by the statute and the court rule." 389 Mich 432.

Overriding those considerations was the statistical reality that 75% of this state's criminal cases are disposed of by guilty plea and the *McMiller* Court's apparent desire to encourage a continuing high rate of plea-based dispositions in order to avoid the injustice inherent in criminal case docket backlog.

Those considerations are not applicable to bar discipline proceedings in this state.

II

Mr. Jaques contends that it is not improper for a lawyer to contact others for the purpose of obtaining their joinder to an action in the nature of a class action.

Mr. Jaques had been retained on December 13, 1971 by the father of a deceased tunnel worker. At the hearing Mr. Jaques testified that he telephoned Robert J. McLaughlin, the union's business agent, for the purpose of discussing the possibility of the union and others joining in a class action he was going to bring to compel the Coast Guard to investigate the tunnel explosion. On December 15 a meeting was suggested and eventually agreed on and Mr. Jaques arranged for a room at a Holiday Inn near Port Huron. The meeting was held later that same day. McLaughlin, a number of union members invited by him (none of whom were victims or survivors of victims), and Father Luigi Maggioni, who represented the families of two victims, attended. Mr. Jaques took along some newspaper clippings

about a successful suit he had initiated similar to the class action he was proposing to file and some "agreements to represent" by which potential plaintiffs could join the suit. The agreements provided no fee would be charged. Several other persons who attended the meeting gave testimony which corroborated the foregoing.

Appellant argues that DR 2-104(A)(5) recognizes a privilege to "contact others for the purpose of obtaining their joinder" and that consequently he should not be disciplined for this activity. The State Bar argues that the disciplinary rule allows only the acceptance of employment, not solicitation of it.

DR 2-104(A) establishes a general prohibition on the acceptance of employment by lawyers who have given unsolicited legal advice. It then provides, however, five exceptions. The fifth, which is in issue here, provides:

"If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, *but shall not seek,* employment from those contacted for the purpose of obtaining their joinder." (Emphasis supplied.)

Without judging Mr. Jaques' determination that an action in the nature of mandamus to compel the Coast Guard to investigate the explosion was appropriate, or that the suit would be more likely to be successful if brought as a class action, we believe the disciplinary rules adopted by this Court are not tolerant of the sort of conduct in which Mr. Jaques was here engaged. Although Mr. Jaques had a client, no suit had yet been filed.[6] An in-person meeting

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[6] There was no absolute need to enlist others to join the proposed class action as parties plaintiff. FR Civ P 23 allows one person to bring suit on behalf of a class.

was *initiated by Mr. Jaques* four days after the tragic tunnel explosion and involved persons with whom he had no prior professional contact. We are not here concerned with court-approved notice to members of a court-approved class.

The entire thrust of the disciplinary rules is that it is unprofessional for an attorney to seek out and solicit persons with whom he or she has no pre-existing relationship in order to suggest litigation begin. DR 2-103(A) prohibits a lawyer from recommending his employment to a nonlawyer who has not sought his advice regarding employment of a lawyer, and under DR 2-103(C) he may not request another to recommend his employment. We believe DR 2-104(A)(5), although allowing acceptance of employment under certain circumstances, represents continued disapproval of personal solicitation by lawyers of specific claims. See ABA Committee on Professional Ethics and Grievances, Formal Opinion No. 111 (May 10, 1934); ABA Committee on Ethics and Professional Responsibility, Informal Opinion No. 1283 (November 20, 1973); *Halverson v Convenient Food Mart, Inc,* 458 F2d 927 (CA 7, 1972). Although we acknowledge and will consider that Mr. Jaques suggests a plausible interpretation of the rule, we do not believe it is a correct one.

III

Mr. Jaques attacks the findings of the hearing panel as being unsupported by the evidence. We have reviewed the record to determine whether there is proper evidentiary support for the two remaining findings of misconduct, I and II.

The hearing panel first found, as discussed above, that

Mr. Jaques had personally solicited the local union and others to join in a class action that would be commenced. Mr. Jaques' own testimony is sufficient proof of this charge.

It was also found that Mr. Jaques requested the union agent, Mr. McLaughlin, to recommend him to persons who had claims arising out of the tunnel explosion. It is undisputed that Mr. Jaques telephoned Mr. McLaughlin, ostensibly for the purpose of getting the union to join the contemplated class action. McLaughlin's testimony at the second hearing supports the findings. He testified that he told Mr. Jaques that most of the families of the tunnel victims had not retained an attorney. Mr. Jaques suggested the two should meet. It is also fairly clear that Mr. Jaques gave Mr. McLaughlin a number of business cards and contingent fee contracts. Mr. Jaques' associate testified before Panel No. 2 that there was a one- to two-inch high stack of Jaques' business cards on a table at the motel, as well as a number of the standard contracts which Mr. Jaques' personal injury claim clients generally signed. Other witnesses who attended the meeting testified they did not see any cards or contracts on any table. Mr. Jaques claims the contracts given to McLaughlin concerned only the class action. However, McLaughlin testified on cross-examination that the contracts contained the word "death" which does not appear in the "authority to represent agreement" Mr. Jaques produced at that later hearing and claimed was the only agreement distributed at the Holiday Inn. McLaughlin testified that Mr. Jaques told him in regard to the business cards that he could "meet with my people" and pass them out, "my people" being the surviving family members of the deceased laborers. McLaughlin apparently did not actively distribute the agreements.

IV

In view of the foregoing we conclude that the findings that Mr. Jaques violated DR 2-103(A) and DR 2-103(C) by personally soliciting McLaughlin and members of the local laborer's union to join in a class action he was planning to file, and DR 2-103(C) by requesting McLaughlin, the agent for the local union, to recommend him to persons who had claims arising out of the tunnel explosion, heretofore described as Grievance Board findings I and II respectively, are supported by substantial evidence in the record.

As indicated, we reverse Grievance Board findings III and IV, the alleged solicitation of Rose Woolstenhulme and the alleged request of William Rounsoville to recommend Jaques to survivors of explosion victims.

Conduct violating rules of ethics adopted by this Court and conduct exposing the profession to obloquy, contempt, censure or reproach are grounds for discipline. State Bar Rule 15, §§ 2(2), 2(3) and 2(4).[7] The kind of solicitation

[7]We are not unmindful that certain broad restrictions on lawyer advertising may no longer be imposed. In *Bates* v *State Bar of Arizona*, — US —; 97 S Ct 2691; 53 L Ed 2d 810 (1977), the United States Supreme Court held that a rule which would punish truthful newspaper advertisement concerning the availability and terms of routine legal services is violative of the First Amendment. The Court specifically pointed out, however, that the problems of inperson solicitation and the attendant possibilities for the exertion of undue influence were not before it.

The instant case presents a situation not of impersonal advertising of routine services directed to the public in general. Rather, we are concerned with direct solicitation of specific claims by an attorney. In addition, it is clear from Mr. Jaques' own testimony that he took to Port Huron newspaper clippings relating his accomplishments as a lawyer. The decision in *Bates*, *supra*, also reserved decision on whether restrictions could be placed on claims as to the quality of services.

Since *Bates* does not reach the constitutionality of the disciplinary rules violated by Mr. Jaques, it is inapplicable to this case.

involved in this case remains the classic example of the public conception of "ambulance chasing" which not only exposes the profession to public contempt, but unjustly exposes its thousands of innocent individual members to concomitant derision and contempt despite their steady allegiance to ethical norms and professional self-discipline.

Having determined that the appellant is guilty of the misconduct described, we modify the Grievance Board's order of discipline to reduce the suspension of Mr. Jaques' license to practice law from 3 years to 24 months from and after the date of entry of our order to that effect and affirm the order as modified.

WILLIAMS, COLEMAN, and FITZGERALD, JJ., concurred with RYAN, J.

BLAIR MOODY, JR., J. *(concurring in part)*. I concur with the analysis and conclusion that the appellant improperly contacted and sought employment from members of a union to join in a class action and asked a union official to solicit clients for him. However, I deem the discipline imposed under the circumstances to be excessive. All evidence relating to direct solicitation of families is excluded from our consideration. I would suspend for one year.

LEVIN, J. The grievance board found that Leonard C. Jaques solicited persons to join his clients, the parents of a victim of the Port Huron tunnel explosion, in a class action seeking a Coast Guard investigation of the explosion and asked a union business agent to recommend him to other persons who had claims arising out of the explosion.

The Court affirms the board's determination of professional misconduct on the grounds that Jaques acknowledged in his testimony at the grievance hearing that he

had solicited the union to join his clients in a class action and there was substantial evidence supporting the charge that he asked the union official to recommend him to persons who had claims.

A disciplinary rule permits a lawyer to communicate with others for the purpose of obtaining their joinder in "litigation in the nature of a class action" where "success in asserting rights or defenses of his client * * * is dependent upon the joinder of others". Code of Professional Responsibility and Canons, DR 2-104(A). The Court states that because no action had as yet been filed in behalf of Jaques' clients the communications seeking joinder were improper. This limitation is not found in the rule and conflicts with its policy.

There was indeed substantial evidence that supports the finding that Jaques asked a union official to recommend him to persons who had claims. The hearing panel, in findings adopted by the grievance board, said that "crucial" to this determination was the testimony of a young former associate of Jaques.[1] There was some other evidence, but there would not have been substantial evidence without her testimony.

A theory of the defense was that she had facilitated the solicitation of victims' families in a manner which gave the impression that Jaques had done so, and that she testified against him in the expectation that the grievance administrator would refrain from bringing charges against her.

[1] Because of the nature of the allegations of Jaques and his witnesses regarding his former associate's activities, she is not identified by name in keeping with the policy of the State Bar Grievance Board Procedural and Administrative Rules that disciplinary files and records shall be kept confidential until a formal complaint is filed. *See* Grievance Rule 16.29.

The associate acknowledged that she asked Eugene LaBelle, attorney for the grievance administrator, shortly before she testified, whether she would be charged and said he responded that he did not believe it was likely. Jaques' lawyer was not permitted to question LaBelle regarding his conversations with this witness.

In finding against Jaques, the panel declared "that there has been no demonstration of any motive on the part" of the associate to testify falsely. Its refusal to allow LaBelle to be questioned may have prevented Jaques from establishing such a motive by showing that, as a result of conversations between this witness and LaBelle, there was a basis for a reasonable expectation on her part that if her testimony supported the allegations against Jaques she would not face charges.

We would reverse and remand for further proceedings because Jaques had a right to seek to impeach this witness by attempting to show that her discussions with LaBelle provided a basis for a reasonable expectation of forebearance or leniency.

I

Two days after the December 11th tunnel explosion, the Woods retained Jaques to recover damages for the death of their son; they entered into a contingent fee agreement. There is no claim that Jaques obtained these clients or, indeed, any other client, in violation of the canons or disciplinary rules. The claim is that he solicited, apparently unsuccessfully, for additional clients who had claims arising out of the tunnel explosion.

The hearing panel found that on "December 14 • • • Jaques decided that the United States Coast Guard should be required to investigate the tunnel explosion as he was of the opinion they were more competent that the state agencies". In another case he had obtained Federal court order compelling the Coast Guard to make an investigation of an accident that occurred on Lake Erie.

Jaques telephoned the business agent for the local union of which 19 of those who died in the explosion were members, to arrange a meeting to discuss a class action to compel the Coast Guard to conduct an investigation of the explosion. Jaques was accompanied to the meeting by his associate. The business agent invited six union members and a priest to the meeting. None of those present was a victim or related to a victim. The priest was interested in the families of two who died in the explosion.

Jaques made a presentation urging the union and others to join his client in an action to compel a Coast Guard investigation.

The business agent testified that the discussion at the meeting concerned Jaques' efforts to obtain joinder in an effort to obtain a Coast Guard investigation. He said that because he was concerned with finding lawyers to represent "[his] people" he believes he asked Jaques for business cards. He recalled receiving agreement forms. By the time of the hearing he had discarded all the forms. He could not describe the contents of the form, but when shown Jaques' form contingent fee agreement he said it "looked like" the forms he received at the meeting. He denied that Jaques suggested that he "ought to get him some clients" or recommend him to victims' families.

Jaques testified that the forms he gave McLaughlin were "agreement to represent contracts", applicable only to the proposed class action, and that they specifically provided that no fee would be charged.[2]

The associate confirmed that the purpose of the meeting was to discuss the proposed class action and that during the presentation Jaques told the audience there would be no charge for participation. She testified further, however, that Jaques piled a "fist full" of contingent fee agreement forms and a stack of business cards on a table in the meeting room.

The associate also testified that Jaques had given $100 to a union steward to cover expenses on a trip to Indiana to talk to widows of victims,[3] but the findings of the grievance board concerning solicitation through this person are set aside for the reasons set forth in my colleague's opinion.

Two of the union members who were present at the meeting and the priest said they did not recall seeing either stacks of business cards or of forms.

The Court infers from the business agent's affirmative response to the isolated question whether the form con-

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[2] Jaques could not produce a copy of the agreement. He reconstructed a facsimile. The panel rejected Jacques' testimony that this was an accurate facsimile and, on the basis of the associate's testimony, found that the agreement was a contingent fee agreement.

[3] This testimony was contradicted by Mr. and Mrs. Woods. *See* fn 9, *infra*.

[4] Although the facsimile prepared by Jaques, assertedly from memory, did not contain the word "death", it is not at all improbable that an "agreement to represent" in connection with a class action to compel an investigation into an explosion which caused 21 fatalities would contain the word "death".

tained the word "death"[4] that the business agent thereby identified the forms he received as contingent fee forms. The thrust of the business agent's testimony, however, was that Jaques never asked him to solicit clients, and that Jaques' only concern was the class action.

It is apparent that the only substantial evidence supportive of the finding that Jaques "requested *the* [*business*] *agent for the local union* * * * to recommend him to persons who had claims ariring out of the explosion" was the testimony of his former associate. (Emphasis supplied.)

There was no evidence that the business agent passed out any of the forms or that he himself solicited or caused anyone to solicit any of the victims' families. The only proper conclusion on this record is that none of the victims' families were solicited as a result of any effort by the business agent.[5]

After the associate completed her testimony, LaBelle and Jaques' lawyer entered into a number of stipulations, one of which was that the associate's testimony recounting conversations with LaBelle was incomplete. The panel refused to accept this stipulation and ordered that she reappear. On her further appearance, in response to a question concerning the omitted portion of the conversation, she said:

"In any event, indirectly related to this case was that I asked Mr. LaBell if he thought—and this was after I told him my version of the story—if he thought that anything I did would likely give rise to a complaint against

[5] All the evidence regarding solicitation of victims' families is excluded from our consideration for the reasons set forth in my colleague's opinion.

me by the bar, and his answer was that, well, one never knows for sure about those things, but, having heard the facts, he did not believe that it was likely, that there would be any—."

Jaques subpoenaed LaBelle who refused to be sworn.[6] The hearing panel granted a motion to quash the subpoena.

[6] The following colloquoy indicates the clarity of the argument by Jaques' lawyer and the refusal of LaBelle to take the stand:

"*Mr. Corace* [*Attorney for Respondent*]: Call Gene LaBelle.

"*Mr. LaBelle:* I respectfully object, decline to be sworn as a witness unless I'm given some tender as to the relevancy of my testimony. I have no actual knowledge as to whether or not Mr. Jaques solicited these cases, or acted in concert with the other people as alleged in the complaint. I have no knowledge with regard to any relevant or material collateral matters.

"*Mr. Corace:* An attorney is like any other person. He is bound to appear when subpoenaed. This attorney has been subpoenaed. He is bound to take the stand, and he is bound to testify, save only for confidential matters learned from his client. That's all.

"There are a host of cases that say that, and they apply to civil lawyers, and those cases are collected in Section 37.25—

"*Mr. Columbo* [*Vice Chairman of Hearing Panel*]: I think we all know the law, Mr. Corace. You realize there is a rule too that it is an unusual procedure to call a lawyer who is participating in a lawsuit.

"I suggest, Mr. Chairman, we have Mr. LaBelle take the stand and we will rule on the question.

"*Chairman Maiullo:* Take the stand, Mr. LaBelle.

"*Mr. LaBelle:* I respectfully refuse to do so, sir.

"You may cite me for contempt and the procedure is outlined in Rule 16.

* * *

"*Mr. LaBelle:* If he thinks I have some relevant evidence, I would like to know what it is.

* * *

"*Mr. Corace:* He knows one thing I'm going to ask him about. I'm going to ask him about his little visit to [the associate].

"*Mr. LaBelle:* I won't testify.

"*Mr. Corace:* I submit that is why he won't take the stand.

"*Mr. LaBelle:* That is not relevant in these proceedings, what I said to her. And besides that it is part of my work product.

* * *

"*Mr. Corace:* We had a stipulation which he refused to receive. When he takes the stand, I'm going to ask him a few questions about like when he walked over here after [the associate] had said, golly, there was nothing I left out, after the second shot the panel gave her, and then he says, stands in front of her and reminds her about something, then she testifies, oh, yes, there was. Come on, now. Where is the privilege? The work product privilege is in discovery, civil discovery, but there is no work product privilege at trial.

"Now, you have known, Mr. Chairman, that this was a storm cloud looming on the horizon and so has Mr. LaBelle and the whole crux of my defense lies with him, right now. He took it upon himself to become investigator and go over to [the associate's] office and sit down with her and have a conversation, and then allowed me to examine her on what the conversation was, and then she was—then stipulated with regard to that conversation, and then came back—then she was called back, now, we have had a lot of it and that is one area that I'm certainly entitled to examine him on.

* * *

"*Mr. Columbo:* We brought [the associate] back to clarify that, and she told us, as I recall it, that she did talk to you about whether or not any charges would be brought against her.

"*Mr. LaBelle:* That is exactly true. Your recollection is perfect, Mr. Vice Chairman.

* * *

"*Mr. Corace:* * * * We have a right to show, through this witness, that after [the associate] was called here, and as the record shows, she was asked whether she had made any omission in her statement with regard to what was discussed between she and this witness, he walked over to her in this courtroom and reminded her of the testimony that she ultimately gave with regard to whether or not she was going to be charged with an unethical practice, and I submit to you that the precise and carefully worded statement that she used is, itself, grounds for examination of this witness. The words were in substance, no, on the basis of the facts as you relate them to me * * *."

II

The panel found that in arranging the meeting and urging the union to join in a class action to compel a Coast Guard investigation Jaques had, on his own testimony, personally solicated employment in violation of the disciplinary rules.

A disciplinary rule provides that a lawyer may not seek employment from non-lawyers who have not sought his advice.[7] Jaques contends that he was not seeking employment but, rather, joinder in litigation in the nature of a class action as permitted by another disciplinary rule:

"If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder." Code of Professional Responsibility and Canons, DR 2-104(A)(5).

The administrator contends that "shall not seek" modifies both "employment" and "joinder" and that the rule therefore prohibits seeking either employment or joinder.

The Court notes that while the Woods had hired Jaques, no action "had yet been filed" when the meeting took place. It concludes that an attorney may not "seek out and solicit persons with whom he or she has no pre-existing relationship in order to suggest litigation begin" and that the "disciplinary rules * * * are not tolerant of the sort of conduct in which Mr. Jaques was here engaged".

The phrase in the disciplinary rule, "from those con-

[7] "A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a nonlawyer who has not sought his advice regarding employment of a lawyer." Code of Professional Responsibility and Canons, DR 2-103(A).

tacted for the purpose of obtaining their joinder", manifestly means that it is proper to communicate with others to obtain their joinder. The principal limitation is that a lawyer may not seek employment from persons with whom he communicates; the rule permits him to accept employment from such persons if offered.

Implicit in the rule is that a lawyer seeking joinder must have a client, but neither the language nor policy of the rule requires that an action have been commenced before solicitation of joinder in that action or in an ancillary action; "presuit communications" are permitted. *Halverson* v *Convenient Food Mart, Inc,* 458 F2d 927, 930-931 (CA 7, 1972). The only limitations in that regard are that the litigation be "in the nature of a class action" and that the client's success in asserting rights or defenses in such litigation is "dependent upon the joinder of others".

Delay in seeking joinder might be a disservice to the lawyer's client, playing into the hands of an adversary who might argue that the delay in seeking joinder should be counted against the client should the lawyer seek to add parties in an action already commenced or to commence an ancillary class action. It might be of utmost importance to assemble all the forces at the outset to persuade the judge of the substantiality of the claim or the significance of the class.

All who testified, including the associate, agreed that Jaques made it clear to the audience that those joining in the class action would not be charged; the hearing panel so found. The proposed class action did not seek a money recovery but simply an investigation.

There is no finding that the meeting was a pretext and that the real purpose was to solicit the families of victims

to employ Jaques to represent them on a contingent fee basis. On the contrary, the panel found that Jaques' "purpose" in calling the business agent was to solicit the union and others to join in the class action.

Jaques subsequently filed an action in the United States District Court in the name of the Woods to compel a Coast Guard investigation. (Neither the union nor any of the other victims joined in this action. The action was not successful.)

The rule differentiates between solicitation for the purpose of obtaining joinder and solicitation of employment. It is not unethical for a lawyer to solicit other claimants to join with his client in a class action "if his motive is not to secure fees for himself". *Halverson* v *Convenient Food Mart, Inc, supra,* p 931.[8]

Jaques had a client when he communicated with the business agent and sought the union's joinder in the class action. He may not properly be disciplined for expeditiously seeking joinder of others in the action to compel a Coast Guard investigation.

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[8] An ethics opinion states that while it is unethical for a lawyer to solicit members of a class for funds to be used to pay compensation, it is not unethical to solicit funds to defray expenses of preparation of a class action. ABA Committee on Ethics and Professional Responsibility, Informal Opinion No. 1326 (May 27, 1975).

Another ethics opinion permits a lawyer to accept employment from class members solicited by a client. The client, seeking joinder and financial assistance in a class action, mailed potential class members a request for an immediate contribution and a limited power of attorney authorizing the client to retain the lawyer and assign him a contingent fee of 35% and a contingent interest of 12% to the client. The lawyer drafted the documents. ABA Committee on Ethics and Professional Responsibility, Informal Opinion No. 1280 (August 8, 1978).

III

In finding that Jaques gave the business agent contingent fee forms and requested that he solicit clients for him, the panel relied primarily on the testimony of Jaques' former associate. Her creditibility was, therefore, as the panel itself observed of "crucial" importance.

Jaques sought to impeach her. He said that she had lied to him on several occasions, and that they were not on good terms when she left his employ. Witnesses contradicted various aspects of her testimony.[9]

It was Jaques' position that it was she who was guilty of misconduct. A witness testified that she gave him Jaques' contingent fee forms and business cards. Jaques said this was without his knowledge. The priest said that the associate called him within two days after the meeting to question him regarding the two families in which he had

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[9] The associate testified that she accompanied Jaques to the Woods' home and that the union steward arrived a short time later. She said she was present at all times during the meeting and that Jaques gave the steward contingent fee forms, business cards and $100 to cover expenses of the Indiana trip.

Jaques said that he visited the Woods' home in response to a telephone call from Woods about other lawyers trying to persuade him to change lawyers and that the union steward, a friend of Woods' son, arrived soon thereafter. He said that the associate was not present at all times; part of the time she was in another room talking to Mrs. Woods. Jaques said that he gave the steward $22 which the steward told Woods his son owed him when he died and which Woods did not have at the time. He said that he paid the money to avoid embarrassment to Woods and that Woods paid him back.

Jaques denied giving the steward contingent fee forms. He said that the steward asked him if he could recommend him to people who were looking for lawyers in connection with the explosion and that he told the steward he would be glad to talk to such persons, but that the steward should not "push" for him. Jaques also said that the steward asked to see a contingent fee agreement and that Woods showed the steward his agreement.

Jaques' story concerning the money and the agreement was corroborated in its essentials by Mr. and Mrs. Woods.

an interest. Jaques testified that the associate would receive a percentage of the legal business she brought to his firm.

Jaques sought to prove that the associate was fearful that she would be charged with misconduct and agreed to testify against him in an effort to avoid being charged herself. The panel erred in denying Jaques' lawyer the opportunity to question LaBelle regarding any discussion or understanding with the associate.[10] See *People* v *Davis*, 52 Mich 569; 18 NW 362 (1884); *People* v *Reed*, 393 Mich 342, 354; 224 NW2d 867 (1975).

Evidence of a witness's interest or motive for testifying has a direct bearing on credibility.[11] The issue is never collateral.[12]

The panel relied fundamentally on the associate's testimony in finding that Jaques had requested the business agent to solicit clients for him. The panel chose to believe her in preference to the conflicting testimony of Jaques, the business agent and other witnesses because "there has been no demonstration of any motive on [her] part • • • [w]hile, on the other hand, Jaques' motive to fail to be

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[10] The associate was not LaBelle's client; there was no attorney-client privilege.

While a lawyer ordinarily should not act if he knows he will be called to testify, this does not disable or shield him from testifying. Code of Professional Responsibility and Canons, DR 5-101(B); DR 5-102. Whether a lawyer who unexpectedly is called should continue to represent his client depends on all the circumstances. *See* Code of Professional Responsibility and Canons, DR 5-101(B)(4); *cf. Phillips* v *Liberty Mutual Insurance Co*, 43 Del Ch 436; 235 A2d 835 (1967); *Galarowicz* v *Ward*, 119 Utah 611; 230 P2d 576 (1951).

[11] MCLA 600.2158; MSA 27A.2158; *People* v *Jackson*, 390 Mich 621, 625, fn 2; 212 NW2d 918 (1973); *People* v *Sesson*, 45 Mich App 288, 301; 206 NW2d 495 (1973), *lv den* 389 Mich 801 (1973). *See, generally*, 3A Wigmore, Evidence (Chadbourn rev), §§ 948-949, pp 783-792; McCormick, Evidence (2d ed), § 40, pp 78-80.

[12] McCormick, *supra;* Wigmore, *supra; Geary* v *People*, 22 Mich 220, 222 (1871).

completely truthful and honest with the panel can be explained only by either his failure to have the integrity to tell the truth and/or his desire not to be punished for the offense which appears to this panel to be clear".

The associate acknowleged that she was apprehensive she might be charged. If the panel had believed Jaques it is possible she would have been charged.

"[A]greements regarding the testimony of a witness materially affect the bias or interest of a witness and should be placed before the trier of fact."[13] Even if there has been no actual promise of leniency, it is proper "to show a belief or even only a hope" of securing favorable treatment in return for testimony. *Farkas* v *United States*, 2 F2d 644, 647 (CA 6, 1924).[14]

Jaques was not bound by the associate's statement denying that LaBell had made any commitment. She "was certainly not as reliable or objective a source of testimony" regarding her motives for testifying as LaBelle who was likely to know under what, if any, pressures she may have been; LaBelle's testimony "may well have differed in substantial degree from the testimony given by" the associate.[15]

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[13] *People* v *Glover*, 47 Mich App 454, 459; 209 NW2d 533 (1973). *Similarly, see People* v *McCoy*, 392 Mich 231; 220 NW2d 456 (1974).

[14] Although these cases and others cited in this opinion arise out of criminal prosecutions, the principle is the same in civil litigation. *See Foster* v *Krause*, 187 Mich 630; 153 NW 1066 (1915); *Durant* v *Stahlin*, 374 Mich 82, 90, fn 5; 130 NW2d 910 (1964); McCormick, *supra*, § 40, pp 78-80 and § 274, p 665, fn 94.

[15] *See Hughes* v *United States*, 427 F2d 66, 68 (CA 9, 1970), where the United States Court of Appeals for the Ninth Circuit held that although an informant admitted charges were pending against him and his hope for leniency, the defendant should have been permitted to question a police officer regarding any pressure exerted upon the informant during conversations between the officer and the informant.

The associate was in a most difficult position. She was concerned that she might face grievance board action. The administrator's case depended on her testimony.

The associate's initial testimony regarding her discussions with LaBelle was incomplete as LaBelle and she subsequently acknowledged. LaBelle, who was not personally involved, could be expected to be more objective than the associate and fully straightforward in his testimony. His testimony would have cleared the air and resolved any doubt regarding expectations of leniency engendered by explicit or tacit understandings with the grievance administrator or LaBelle.

The confidence of the profession and of the public in the administration of grievance proceedings is not served by the refusal of the administrator's counsel to be sworn and testify fully regarding any circumstances which might affect the legitimacy of the evidence on which the administrator relies in asserting that a lawyer has not conducted himself in accordance with the standards of the profession.

IV

The discipline imposed by the grievance board, three years suspension, manifestly was based on the findings of solicitation of victims' families set aside by this Court.

The reduced discipline, two years suspension, cannot, in light of the discipline imposed by other hearing panels and the grievance board, be justified on the findings that are affirmed.

—In two cases lawyers were *reprimanded* for soliciting worker's compensation claims through runners.[16]

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[16] State Bar Grievance Board, Synopses of Cases Disposed of by Formal Hearing from March 1, 1970 (looseleaf), Reprimands, p 6, File No. 27980; *id*, p 14, File No. 27981.

—In one case the lawyers offered a police officer compensation to refer arrested persons to them; paralleling the facts here, no referrals were made and there was no further communication between the lawyers and the officer. The lawyers were *reprimanded*.[17]

—A *two-month suspension* was imposed where the lawyer pled nolo contendere to two of five counts charging solicitation of clients in traffic court; the other counts were dismissed.[18]

—The grievance board increased the 120-day suspension imposed by the hearing panel to a *one-year suspension* "for solicitation of three personal injury claims where the evidence disclosed money was paid layman [*sic*] for referring clients to him".[19]

The novel construction of the disciplinary rule aside, neither the union nor any other person joined Jaques' client in the class action. There is no evidence that the business agent or anyone acting at his suggestion solicited anyone to employ Jaques; Jaques obtained no client and no fees from the asserted request for clients. It is not claimed that he promised the business agent any compensation; the business agent was not a police officer or other public official.

The discipline is excessive and appears to be imposed on the evidence supportive of the findings of actual solicitation by or for Jaques of families of victims that have been set aside.

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[17] *Id*, p 29, File Nos. 32798, 32800.

[18] *Id*, Suspensions, p 19, File No. 30413.

[19] *Id*, p 28, File No. 29651.

We would reverse and remand for further proceedings. KAVANAGH, C. J., concurred with LEVIN, J.

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 15th day of December in the year of our Lord one thousand nine hundred and seventy-seven.

Present the Honorable THOMAS GILES KAVANAGH, Chief Justice; G. MENNEN WILLIAMS, CHARLES L. LEVIN, MARY S. COLEMAN, JOHN W. FITZGERALD, JAMES L. RYAN, BLAIR MOODY, JR., Associate Justices.

Rehearing No. 438

In the Matter of the Complaint
against Leonard C. Jaques before
the State Bar Grievance Board,
LEONARD C. JAQUES,
58697
Appellant.

On order of the Court, an application for rehearing filed by the appellant, a motion to disqualify appellant's counsel filed by the State Bar Grievance Board, and a motion to extend the time for filing supplementary matter in support of the application for rehearing filed by substituted counsel for the appellant, are considered.

It is HEREBY ORDERED that the application for rehearing and the motion to extend time are DENIED: the motion to disqualify appellant's counsel is DENIED as moot: and the stay of suspension hertofore granted by order dated August 9, 1976 is TERMINATED.

Chief Justice Kavanagh and Justice Levin dissenting:

We would grant the motion for an extension of time permitting appellant's substituted counsel to review the motion of rehearing and to file supplementary matter in support thereof.

Certiorari having been granted by the United States Supreme Court in Ohralik v Ohio State Bar Ass'n, 48 Ohio St2d 217, No 77-1650 and In re Smith, 233 SE2d 301, No 77-56, and it appearing that the decisions in those cases may be dispositive of the present application for rehearing, we would hold the present application in abeyance and continue the stay of appellant's suspension pending the decisions in Ohralik v Ohio State Bar Ass'n and In re Smith.

STATE OF MICHIGAN—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 15th day of December in the year of our Lord one thousand nine hundred and seventy-seven.

/s/ CONLIN R. DAVIS
Deputy Clerk

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme

Court Room, in the City of Lansing, on the 20th day of December in the year of our Lord one thousand nine hundred and seventy-seven.

Present the Honorable THOMAS GILES KAVANAGH, Chief Justice; G. MENNEN WILLIAMS, CHARLES L. LEVIN, MARY S. COLEMAN, JOHN W. FITZGERALD, JAMES L. RYAN, BLAIR MOODY, JR., Associate Justices.

Rehearing No. 438

In the Matter of the Complaint
against Leonard C. Jaques before
the State Bar Grievance Board,
LEONARD C. JAQUES,
58697
Appellant.

AMENDED ORDER

On order of the Court, an application for rehearing filed by the appellant, a motion to disqualify appellant's counsel filed by the State Bar Grievance Board, and a motion to extend the time for filing supplementary matter in support of the application for rehearing filed by substituted counsel for the appellant, are considered.

It is HEREBY ORDERED that the application for rehearing and the motion to extend time are DENIED: the motion to disqualify appellant's counsel is DENIED as moot: and the stay of suspension hertofore granted by order dated August 9, 1976 is TERMINATED.

Chief Justice Kavanagh and Justice Levin dissenting:

We would grant the motion for an extension of time permitting appellant's substituted counsel to review the motion of rehearing and to file supplementary matter in support thereof.

Certiorari having been granted by the United States Supreme Court in Ohralik v Ohio State Bar Ass'n, 48 Ohio St2d 217, No 771650 and In re Smith, 233 SE2d 301, No 7756, and it appearing that the decisions in those cases may be dispositive of the present application for rehearing, we would hold the present application in abeyance and continue to stay of appellant's suspension pending the decision in Ohralik v Ohio State Bar Ass'n and In re Smith.

Justice Fitzgerald would grant the motion for an extension of time to file supplementary matter in support of the application and until said matter was considered by the Court would withhold action upon the application for rehearing.

STATE OF MICHIGAN—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 20th day of December in the year of our Lord one thousand nine hundred and seventy-seven.

/s/ HAROLD HOAG
Clerk

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES,
Amendment One:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

CONSTITUTION OF THE UNITED STATES,
Amendment Fourteen:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

DR 2-103 (A), adopted by the Supreme Court of Michigan:
A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a nonlawyer who has not sought his advice regarding employment of a lawyer.

DR 2-103 (C), adopted by the Supreme Court of Michigan:
A lawyer shall not request a person or organization to recommend employment, as a private practioner, of himself, his partner, or associate, except that he may request referrals from a lawyer referral service operated, spon-

sored, or approved by a bar association representative of the general bar of the geographical area in which the association exists and may pay its fees incident thereto.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEONARD C. JAQUES,

-vs- Civil Action No. 772953

Plaintiff, Hon. Robert E. DeMascio

RICHARD H. SENTER,

Defendant.

STIPULATION OF FACTS

In the State Bar disciplinary proceedings, Plaintiff was charged with having violated DR 2-103 (A) DR 2-103 (C) and DR 2-104 (A) (5) in two particulars:

I. Seeking the business agent, Robert J. McLaughlin, to join his laborer's in Port Huron in a mandamus suit to be filed in Federal Court on behalf of Plaintiff's client in the nature of a class action to force the Coast Guard to investigate the cause of a tunnel explosion;

II. Having requested McLaughlin to recommend Plaintiff to persons who had claims arising out of the explosion.

The two charges arose out of one incident. It is hereby stipulated by Defendant Richard H. Senter and Leonard C. Jaques, Plaintiff, through their respective counsel of record, that the following evidence before the Supreme Court of Michigan constitutes the relevant and material facts upon which the Michigan Supreme Court sustained the findings of the two charges and constitute the conduct for which discipline was imposed.

Plaintiff was retained by the family of one of the death victims of the Port Huron tunnel explosion, but had not yet commenced suit when, on December 15, 1971, he telephoned Robert McLaughlin, business agent for the local laborer's union, in Port Huron to arrange a meeting for the purpose of discussing prospects of McLaughlin encouraging and obtaining the local union and union members victimized by the explosion to join in a class action in the Federal Court planned by the Plaintiff to seek an order of mandamus to compel the Coast Guard to investigate the cause of the explosion. Through arrangements made by plaintiff, they met the same day in a Holiday Inn in Port Huron. McLaughlin on his own brought along a priest and union members who were not victims of the explosion. Plaintiff brought along his lawyer-employee Marilyn Jean Kelly, in addition to newspaper clippings about a successful mandamus suit Plaintiff brought in Federal Court in Ohio involving an action similar to the class action he was proposing, which he discussed, in addition to some "agreements to represent" by which potential plaintiffs, free and without charge, could join in the mandamus action. Plaintiff also brought with him business cards.

Marilyn Jean Kelly said that although she did not know who placed them, she did see Plaintiff's cards and fee contracts on the table. Others at the meeting who appeared as witnesses denied seeing them on the table. McLaughlin told Plaintiff that most of the families of the tunnel victims had not retained an attorney and he was looking for one to recommend. McLaughlin asked for and received from Plaintiff some fee contracts, whereupon McLaughlin later looked them over, put them away in a desk drawer, then destroyed them all the following day. McLaughlin also

asked plaintiff for some business cards and when plaintiff gave them to him he told McLaughlin he could meet with his people and pass them out if he wanted to.

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By: /s/ MARK R. BENDURE
(P 23490)
Attorney for Plaintiff
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STATE BAR GRIEVANCE ADMINISTRATION
By: /s/ LOUIS ROSENZWEIG
(P 19650)
Attorney for Defendant
600 Woodward Avenue
Detroit, Michigan 48226
(313) 961-6585

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
SOUTHERN DIVISION

LEONARD C. JAQUES,
Plaintiff,
vs
RICHARD H. SENTER
Defendant.

Civil Action No.
772 953

PRELIMINARY INJUNCTION

Plaintiff having filed a Complaint seeking temporary and permanent injunctive relief under 42 USC §1983, and this Court having issued an Order to Show Cause, and a hearing having been held and the Court having entertained the

argument of counsel, and the Court having concluded that a high likelihood of success exists that plaintiff may prevail on the Claims arising under the First Amendment to the Constitution of the United States and that the enforcement of the Order of Suspension prior to a decision on the merits will cause great and immediate irreparable harm to Plaintiff;

NOW THEREFORE

IT IS HEREBY ORDERED that Defendant RICHARD H. SENTER, Michigan State Bar Grievance Administrator, be and hereby is restrained and enjoined from exercising his duty under Michigan State Bar Rule 16.13 to enforce the suspension of Plaintiff, LEONARD C. JAQUES'S license to practice law in the State of Michigan until further Order of this Court.

HON. ROBERT E. DeMASCIO

Dated: December 27, 1977.

Approved as to form:
Louis Rosenzweig (P-19650)
Attorney for Defendant
600 Woodward Avenue
Detroit, MI 48226
(313) 961-6585
Mark R. Bendure (P-23490)
Attorney for Plaintiff
1410 Lafayette Bldg.
Detroit, MI 48226
(313) 961-1525
(A True Copy)
HENRY R. HANSSEN, Clerk
By: SHERRY STAMPS, Deputy Clerk

Note: Filed March 15, 1978

STATE OF MICHIGAN
IN THE SUPREME COURT

STATE BAR GRIEVANCE ADMINISTRATOR, Plaintiff-Appellee,	Supreme Court No. 58,697
-vs-	State Bar File
LEONARD C. JAQUES, Defendant-Appellant,	30844-A; 31899-A

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that LEONARD C. JAQUES, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of Michigan Supreme Court on December 15, 1977, amended December 20, 1977 denying rehearing of its order affirming Appellant's suspension from the practice of law and the opinion rendered October 24, 1977.

This appeal is taken pursuant to 28 USC §1257(2) and 28 USC §1257(3).

The issues to be raised on this appeal are as follows:

I Whether the disciplinary rules, as construed and applied to Appellant, are repugnant to the guarantees of the First and Fourteenth Amendments.

A. Whether the decision is in conflict with *NAACP* v *Button,* 371 US 415 (1963), *Brotherhood of Railroad Trainmen* v *Virginia,* 377 US 1 (1964) and *United Transportation Union* v *State Bar of Michigan,* 401 US 576 (1971) which hold that the First Amendment authorizes

an attorney and organization to act collectively to assure meaningful access to the courts.

B. Whether the decision is in conflict with *NAACP* v *Button, supra,* which holds that a statute which, on its face, prohibits both protected and unprotected speech, offends by its overbreadth the guarantees of the First Amendment.

C. Whether the decision below conflicts with *Bates* v *State Bar of Arizona,* 45 U.S.L.W. 4895 (1977) by prohibiting the free flow of information from an attorney to one desiring to hear the attorney's message in the absence of a compelling state interest expressed in a narrowly drawn regulation.

II Whether the decision by the Supreme Court of Michigan conflicts with the supremacy clause, article 6, clause 2, of the Constitution of the United States by permitting the state to exact a penalty from an attorney for exercising the perogatives of federal practice in prosecuting an action in federal court.

III Whether Appellant was denied the due process guarantees of the Fourteenth Amendment during the administrative proceedings.

A. Whether due process is offended by a procedure whereby a litigant is denied the opportunity to call a witness on his own behalf where state law does not prohibit him from calling that witness.

B. Whether due process is offended by procedures whereby a litigant seeking to establish the grounds for disqualification of the decirion-maker is precluded from the inquiry necessary to establish the basis of the disqualification motion.

C. Whether due process requires that findings of fact be vacated where the decision-maker improperly receives and considers edited transcripts of prior testimony.

GROMEK & BENDURE
By: /s/ MARK R. BENDURE
(P-23490)
Attorneys for Defendant-Appellant
1410 Lafayette Building
Detroit, Michigan 48226
(313) 961-1525

Dated: March ~~10~~ 15, 1978.

Note: Filed March ~~10~~ 15, 1978

(Title of Court and Cause)

REQUEST FOR CERTIFICATION
AND TRANSMISSION OF RECORD

TO: Harold Hoag
Clerk of the Michigan Supreme Court

Pursuant to Rule 12(1) of the Rules of the Supreme Court of the United States, you are hereby requested to certify and transmit to the Supreme Court the entire record of the above-entitled cause.

GROMEK & BENDURE
By: /s/ MARK R. BENDURE
(P 23490)
Attorneys for Defendant-Appellant
1410 Lafayette Building
Detroit, Michigan 48226
(313) 961-1525

Dated: March ~~10~~ 15, 1978

Note: Filed March ~~10~~ 15, 1978

(Title of Court and Cause)

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

I, MARK R. BENDURE, attorney in the office of Messrs. GROMEK & BENDURE, attorneys of record for LEONARD C. JAQUES, Appellant herein, depose and say that on the ~~10~~ 15th day of March, 1978, I served a copy of the Notice of Appeal to the Supreme Court of the United States on RICHARD SENTER, State Bar Grievance Administrator, Appellee herein, by delivering the same to the receptionist in the offices of Counsel for the State Bar Grievance Administrator, counsel of record for said Administrator, located at 600 Woodward Avenue, Detroit, Michigan 48226.

/s/ MARK R. BENDURE

Subscribed and sworn to before
me this ~~10~~ 15th day of March, 1978.
/s/ CARL T. GROMEK
Notary Public, Wayne County, MI
My commission expires: 3/15/80

Supreme Court, U. S.
FILED
MAR 15 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77- 1306

LEONARD C. JAQUES,

Appellant,

vs

STATE BAR GRIEVANCE ADMINISTRATOR,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF THE
STATE OF MICHIGAN

SUPPLEMENTARY APPENDIX TO JURISDICTIONAL STATEMENT

LEONARD C. JAQUES
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FOR APPPELLANT

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ATTORNEYS FOR
APPELLANT

THE INLAND PRESS, DETROIT, MICHIGAN

The Table of Contents and Appendix to the Jurisdictional Statement filed in this cause indicate that the Notice of Appeal was filed in the state court on March 15, 1978. Upon inquiry, it has been determined that the Notice of Appeal, which was filed in the Supreme Court of the State of Michigan by mail, was not received and filed by that court by the date of March 15, 1978. Upon discovering this, Appellant has filed another original Notice of Appeal in the state court by hand delivery of the same as set forth herein on March 16, 1978.

Filed in the Supreme Court of
Michigan on March 16, 1978

STATE OF MICHIGAN
IN THE SUPREME COURT

STATE BAR GRIEVANCE ADMINISTRATOR, Plaintiff-Appellee, -vs- LEONARD C. JAQUES, Defendant-Appellant,	Supreme Court No. 58,697 State Bar File 30844-A; 31899-A

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that LEONARD C. JAQUES, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of Michigan Supreme Court on December 15, 1977, amended December 20, 1977, denying rehearing of its order affirming Appellant's suspension from the practice of law and the opinion rendered October 24, 1977.

This appeal is taken pursuant to 28 USC §1257(2) and 28 USC §1257(3).

The issues to be raised on this appeal are as follows:

I Whether the disciplinary rules, as construed and applied to Appellant, are repugnant to the guarantees of the First and Fourteenth Amendments.

A. Whether the decision is in conflict with *NAACP* v *Button*, 371 US 415 (1963), *Brotherhood of Railroad Trainmen* v *Virgiria*, 377 US 1 (1964) and *United Transportation Union* v *State Bar of Michigan*, 401 US 576 (1971) which hold that the First Amendment authorizes

an attorney and organization to act collectively to assure meaningful access to the courts.

B. Whether the decision is in conflict with *NAACP* v *Button*, supra, which holds that a statute which, on its face, prohibits both protected and unprotected speech, offends by its overbreadth the guarantees of the First Amendment.

C. Whether the decision below conflicts with *Bates* v *State Bar of Arizona*, 45 U.S.L.W. 4895 (1977) by prohibiting the free flow of information from an attorney to one desiring to hear the attorney's message in the absence of a compelling state interest expressed in a narrowly drawn regulation.

II Whether the decision by the Supreme Court of Michigan conflicts with the supremacy clause, article 6, clause 2, of the Constitution of the United States by permitting the state to exact a penalty from an attorney for exercising the prerogatives of federal practice in prosecuting an action in federal court.

III Whether Appellant was denied the due process guarantees of the Fourteenth Amendment during the administrative proceedings.

A. Whether due process is offended by a procedure whereby a litigant is denied the opportunity to call a witness on his own behalf where state law does not prohibit him from calling that witness.

B. Whether due process is offended by procedures whereby a litigant seeking to establish the grounds for disqualification of the decision-maker is precluded from the inquiry necessary to establish the basis of the disqualification motion.

C. Whether due process requires that findings of fact be vacated where the decision-maker improperly receives and considers edited transcripts of prior testimony.

GROMEK & BENDURE
BY: /s/ MARK R. BENDURE
(P-23490)
Attorneys for Defendant-Appellant
1410 Lafayette Building
Detroit, Michigan 48226
(313) 961-1525

Dated: March 10, 1978.

Filed in the Supreme Court
of Michigan, March 16, 1978

(Title of Court and Cause)

REQUEST FOR CERTIFICATION
AND TRANSMISSION OF RECORD

To: Harold Hoag
Clerk of the Michigan Supreme Court

Pursuant to Rule 12(1) of the Rules of the Supreme Court of the United States, you are hereby requested to certify and transmit to the Supreme Court of the United States the entire record of the above-entitled cause.

GROMEK & BENDURE
BY: /s/ MARK R. BENDURE
(P-23490)
Attorneys for Defendant-Appellant
1410 Lafayette Building
Detroit, Michigan 48226
(313) 961-1525

Dated: March 10, 1978.

Filed in the Supreme Court
of Michigan on March 16, 1978

(Title of Court and Cause)

PROOF OF SERVICE OF NOTICE OF
APPEAL ON APPELLEE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

MARK R. BENDURE, being first duly sworn, deposes and says that on March 15, 1978, he, as counsel for LEONARD C. JAQUES, Defendant-Appellant herein, served copies of the Notice of Appeal to the Supreme Court of the United States and Request for Certification and Transmission of Records on Appellee by hand delivering the same to LOUIS ROSENZWEIG, counsel for the State Bar Grievance Administrator, at the office of the State Bar Grievance Administrator located at 600 Woodward Avenue, 10th floor, Detroit, Michigan 48226.

/s/ MARK R. BENDURE

Subscribed and sworn to before me
this 16th day of March, 1978.
/s/ CARL L. GROMEK
Notary Public
Wayne County, Michigan
My commission expires: 3/15/80

(Title of Court and Cause)

PROOF OF FILING NOTICE OF APPEAL
AND REQUEST FOR CERTIFICATION

STATE OF MICHIGAN)
) SS.
COUNTY OF WAYNE)

KEITH KEMPAINEN, being first duly sworn, deposes and says that on the 16th day of March, 1978, he filed the Notice of Appeal to the Supreme Court of the United States and Request for Certification and Transmission of Record with the Supreme Court of the State of Michigan by hand delivering the same on March 16, 1978 to the office of the Court Clerk of the Supreme Court of Michigan.

/s/ KEITH KEMPAINEN

Subscribed and sworn to before me
this 16th day of March, 1978.
/s/ MARK R. BENDURE,
Notary Public
Wayne County, Michigan
My commission expires: 3/15/80

Supreme Court, U. S.
FILED
APR 21 1978
MICHAEL RODAK, JR., CLERK

No. 77-1306

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

LEONARD C. JAQUES,

Appellant,

vs.

STATE BAR GRIEVANCE ADMINISTRATOR,

Appellee.

Michigan Supreme Court No. 58697

On Appeal from the Supreme Court of the State of Michigan No. 58697

MOTION TO DISMISS OR AFFIRM APPEAL

LOUIS ROSENZWEIG (P 19650)
Attorney for Appellee

600 Woodward Avenue, 10th Floor
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AMERICAN BRIEF AND RECORD COMPANY, 125 WEALTHY STREET, S.E., GRAND RAPIDS, MICHIGAN 49503 — PHONE 458-5326

No. 77-1306

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

LEONARD C. JAQUES,
Appellant,

vs.

Michigan Supreme Court No. 58697

STATE BAR GRIEVANCE ADMINISTRATOR,
Appellee.

On Appeal from the Supreme Court of the State of Michigan No. 58697

MOTION TO DISMISS OR AFFIRM APPEAL

Now Comes Appellee, the State Bar Grievance Administrator, pursuant to Rule 16.1 of the Revised Rules of the Supreme Court of the United States and moves this Honorable Court to dismiss this appeal, or in the alternative affirm the Opinion and Judgment of the Supreme Court of Michigan, on the grounds that the Court does not have jurisdiction of this Appeal and the Appellant's jurisdictional statement does not present a substantial federal question, or, arguendo, it is manifest that the questions on which the decision of this cause depend are so unsubstantial as not to need further argument.

Opinion Below

The Opinion of the Supreme Court of Michigan is reported at 401 Mich 516, 258 NW2d 443 (1977). The Michigan Supreme Court's Order denying rehearing is reported at 402 Mich 595 (1977).

STATEMENT

On or about January 28, 1972, the staff of the Grievance Administrator undertook to investigate allegations of professional misconduct arising out of the tunnel explosion at Port Huron which had claimed twenty-one lives December 11, 1971.

As the result of the investigation a Request for Investigation was prepared and served upon Appellant on or after March 31, 1972. Appellant's answer was filed May 3, 1972. A formal complaint was then prepared and personally served upon Appellant on or about June 29, 1972 who, thereafter, filed a responsive answer. The matter was assigned for trial to Wayne County Hearing Panel No. 17.

The hearing before Panel No. 17 began November 13, 1973. Appellant was represented by experienced counsel, a former assistant United States attorney. The testimony of the following witnesses was taken: Appellant; William Rounsoville; Robert J. McLaughlin; Father Liugi Maggioni; Madalene Williams; and, Rose Woolstenhulme.

On November 14, 1972, before counsel for the Grievance Administrator could continue his presentation, Appellant capitulated and offered to plead no contest to an amended allegation. His plea was accepted and a further hearing was scheduled to permit Appellant an opportunity to present evidence in mitigation of discipline. That meeting convened December 7, 1972 at which time Appellant attempted to offer proof of his innocence of the allegations of the

amended formal complaint. His offer was rejected by the panel. Appellant then filed a motion to set aside the plea on the ground he did not understand the plea and the effect of it, upon which he was afforded a hearing. The motion was denied and Hearing Panel No. 17 filed its report and order suspending Appellant from the practice of law for a period of one year and taxing costs.

Appellant filed a claim of appeal with the State Bar Grievance Board which, after hearing the argument of counsel, entered an order setting aside the plea. The Board dismissed the amended complaint without prejudice and reinstated the original formal complaint which was remanded to Hearing Panel No. 17 "to complete the formal hearing . . . to commence, nunc pro tunc, as of the conclusion of the testimony of . . . the 13th day of November, 1972".

A second formal complaint was filed and served upon Appellant on or after July 16, 1973. The two complaints were then consolidated for trial and assigned to Hearing Panel No. 12, with the prior knowledge of counsel for Appellant, Panel No. 17 having disqualified itself. Panel No. 12 was thereafter disqualified upon Appellant's motion. Appellant was then given his choice of panels but declined. The consolidated complaints were then assigned to Hearing Panel No. 2, whose members were furnished a transcript of the testimony and the exhibits introduced before Panel No. 17. Hearing was scheduled for October 22, 1974.

The hearing commenced October 22, 1974 and a number of preliminary motions by Appellant were denied. Testimony was taken October 22-23, 1974; November 26-27, 1974; January 22-24, 1975; and, May 14-16, 1975. The transcript includes 2263 pages.

At the hearing before Panel No. 2, two of the witnesses, Rose Woolstenhulme and William Rounsoville, who had testified before Panel No. 17, did not appear. Counsel for the Grievance Administrator offered the transcript of the tes-

timony and exhibits of the hearing before Panel No. 17. Over objection, they were admitted into evidence. Upon conclusion of the hearing before Panel No. 2 it filed its report. It found Appellant had violated disciplinary rules in four instances, which are summarized in the lower Court's opinion, Appellant's Appendix, 8a, 9a, and ordered a suspension of 3 years. On appeal to the Grievance Board, it was affirmed, and on appeal to the Michigan Supreme Court, the Court reversed the Panel's findings as to items 4 and 5, because of the use of the transcript of the hearing before Panel No. 17 and affirmed the findings 1 and 2. It reduced the suspension to 2 years.

Appellant filed a Motion for Rehearing. The motion was denied on December 15, 1977, Appendix, 37a, and an amended order was entered on December 20, 1977, Appendix, 39a. On December 19, 1977, Appellant filed a Section 1983 complaint against Respondent in the District Court for the Eastern District of Michigan. He requested a declaratory judgment that the proceedings, including the order of suspension, are violative of his constitutional rights and for a temporary and permanent injunction restraining Respondent from enforcing the order of suspension. A temporary injunction was issued by the Honorable Robert E. DeMascio on December 17, 1977, restraining Respondent from enforcing the order of suspension. At a pretrial hearing, Judge DeMascio requested a stipulation of facts upon which the Michigan Supreme Court relied, bifurcating the facts in 2 issues, viz, (1) Appellant's right to solicit claims to join in a class action suit, and (2) to solicit claimants to start suit for personal injuries. In response to the Court's request and for the purpose of that suit, the stipulation was filed, Appendix, 42a-44a. Motions for summary judgment are pending, awaiting decision.

ARGUMENT

THE COURT LACKS JURISDICTION OVER THIS APPEAL.

Respondent contends the Court lacks jurisdiction because Appellant did not raise the First Amendment claim in the Court below. In *Whitney* v *California,* 274 US 357, 360, 71 L Ed 1095, 1099 (1926) this Court said:

> "It has long been settled that this court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a Federal question constituting an appropriate ground for *such review was presented in and expressly or necessarily decided by such state court.*" (Emphasis supplied).

At no point in the case, either before the Grievance Board or in the Michigan Supreme Court did Appellant plead First Amendment rights. His grounds for error in the Michigan Supreme Court related to claimed errors of procedure and evidence before the Grievance Board, which he claimed violated due process. The first time he raises the First Amendment is in his motion for rehearing filed in the Michigan Supreme Court and it was not considered or decided by the Court. (Appellant's Appendix, 39a). This is clearly shown by the dissent in the order denying rehearing (Appendix 38a, 40a). Under these facts, this Court has consistently held it has no jurisdiction. ***Brinkerhoff-Farris Trust & Savings Co*** v ***Hill,*** 281 US 673, 74 L Ed 1107 (1930); ***American Surety Co*** v ***Baldwin,*** 287 US 156, 77 L Ed 231, 53 S Ct 98 (1926); ***Live Oak Water Users Asso*** v ***Railroad Commission,*** 269 US 354, 70 L Ed 305, 46 S Ct 149 (1926); ***McGarrity*** v ***Delaware River Bridge Commission,*** 292 US 19, 78 L Ed 1095, 54 S Ct 565 (1949), rehear den,

292 US 19, 78 L Ed 1468, 54 S Ct 771 (1934); *Herndon* v *Georgia,* 295 US 441, 79 L Ed 1530 (1935).

APPELLANT'S JURISDICTIONAL STATEMENT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION NOR DO THE QUESTIONS UPON WHICH THE DECISION OF THIS CAUSE DEPEND NEED FURTHER ARGUMENT.

The history of the United States Supreme Court has yielded less than thirty cases which have warranted argument and opinions concerning the discipline of attorneys for misconduct. A review of all reported decisions of this Court discloses a single case where the State disciplinary proceedings were reversed. *Spevack* v *Klein,* 385 US 511, 17 L Ed 2d 574, 87 S Ct 625 (1967) reversing *Cohen* v *Hurley,* 366 US 117, 6 L Ed 2d 156, 81 S Ct 954 (1961).

More important, perhaps, are at least three opinions of this Court which have reversed Federal system disbarments while refusing to overturn discpline administered the same attorneys, for the same misconduct, by the State systems. *In re Isserman,* 345 US 286, 97 L Ed 1013, 73 S Ct 676 (1953); *Theard* v *United States,* 354 US 278, 1 L Ed 2d 1342, 77 S Ct 1274 (1957); and, *In re Ruffalo,* 390 US 544, 20 L Ed 2d 117, 88 S Ct 1222 (1968).

The reluctance of this Court to review State disciplinary proceedings, and the reason therefor, is set forth in the Court's opinion in *Selling* v *Radford,* 243 US 46, 61 L Ed 585, 37 S Ct 377 (1917):

> In coming to solve that question three things are patent: (a) that we have no authority to re-examine or reverse, as a reviewing court, the action of the supreme Court of Michigan in disbarring a member of the Bar of the courts of that state for personal and professional misconduct; (b) that the order of disbarment is not binding upon us as the thing adjudged in a technical sense, and (c) that albeit this is the case, yet, as we have previously shown, the necessary effect of the action of the supreme court of Michigan, as long as it stands unreversed, unless for some reason it is found that it ought not to be accepted or given effect to, has been to absolutely destroy the condition of fair private and professional character, without the possession of which there could be no possible right to continue to be a member of this Bar. 61 L Ed 587.

Thus, within the narrow limits of review open to this Court, does Appellant's jurisdictional statement present substantial federal questions which need further argument?

A. The Conduct Of Appellant In Soliciting Clients To Join In A Class Action Does Not Come Within The Purview Of *NAACP* v *Button* And Related Cases.

Appellant's statement of the issue on page 15 of his brief is a twisting of the facts. Far from the union seeking Appellant as counsel to represent the injured or families of the killed, it was the Appellant who initiated the meeting with the union representative. It was the Appellant who requested McLaughlin, the union representative to recommend him to his members and gave him cards and contracts for that purpose.

A comparison of the objectives in *NAACP* v *Button,* 371 US 415, 91 L Ed 2d, 83 S Ct 328 (1963); *Brotherhood of Railroad Trainmen* v *Virginia,* 377 US 1, 12 L Ed 2d 89, 84 S Ct 1113 (1964), and *United Transportation Union* v *State Bar of Michigan,* 401 US 576, 28 L Ed 2d 339, 91 S Ct 1076 (1971), and of the Appellant and his objective in the instant case, clearly illustrate the differences and the Appellant's conduct does not fall within the purview of these cases. In *Button,* the NAACP is a non-profit corporation, organized to secure the elimination of all racial barriers

which deprive Negro citizens of the privileges and burdens of equal citizenship rights in the United States. It devotes much of its funds and energies to an extensive program of assisting certain kinds of litigation on behalf of its declared purposes. The Virginia Conference (group of branches of NAACP) maintained a staff of 15 attorneys and ordinarily financed cases in which a litigant retained an NAACP staff lawyer to represent him and the lawyer was paid by NAACP. The staff member may not accept from the litigant or any other source, *any other compensation for his services* in an NAACP case. (Emphasis supplied) Typically, an NAACP branch would invite a staff lawyer to explain to a meeting of parents and children the legal steps necessary to achieve desegregation. He would bring printed forms to the meeting authorizing him, and any other NAACP or Defense Fund attorneys to represent the signers in legal proceedings to achieve desegregation.

In the *Brotherhood of Railroad Trainmen* case, *supra*, the appellant was a union of railroad workers. In order to assist the prosecution of claims by injured railroad workers or by the family of workers killed on the job, the Brotherhood maintains a department of Legal Counsel which recommends to Brotherhood members and their families the names of lawyers whom the Brotherhood believes to be honest and competent.

The rationale of these cases is explained in the *United Transportation* case, *supra*. This was another Brotherhood of Railroad Trainmen case. Mr. Justice Black there explained; 28 L Ed 2d 347:

> *"The common thread running through our decisions in NAACP* v. *Button, Trainmen, and United Mine Workers is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or others*

> *the means of enabling their members to meet the costs of legal representation. That was the holding in United Mine Workers, Trainmen, and NAACP* v. *Button."*

These cases are vastly different than this case. Mr. Laughlin, the union agent, was not seeking Appellant to retain him on behalf of his members. Appellant was seeking the union to join in a class action for the benefit of his client in purely personal litigation. As pointed out in *Button,* and the *Trainmen* cases, in the context of the objectives of the Appellant in these cases, *the litigation is not a technique of resolving private differences.* In the case of the *NAACP* it was a means for achieving the lawful objective of equality of treatment for members of the Negro community in this country. In this context it is another form of political activity. In the *Trainmen* cases, it was an effort on the part of the union to aid its members, who were killed or injured, by obtaining competent lawyers at reasonable fees. There are no such objectives by Appellant here. The attempt by Appellant, on page 17 of his brief to so equate his action, is ludicrous.

Moreover, as pointed out by the Michigan Supreme Court, Appendix, 17a, n 6, "There was no absolute need to enlist others to join in the proposed class action as parties plaintiff. F.R. Civ. P. 23 allows one person to bring suit on behalf of the class."

B. Solicitation Of Clients By Lawyers Is Not Protected By The First Amendment.

That the State has a deep interest in regulating the activities of lawyers is unquestioned. The Court in *Bates* v *State Bar of Arizona,* 433 US 350, 53 L Ed 2d 810, 822, 97 S Ct 2691 (1977), conceded:

"[T]he regulation of the activities of the bar is at the case of the State's power to protect the public. Indeed, this Court in *Goldfarb* acknowledged that [t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been officers of the Courts. 421 US at 792, 44 L Ed 2d 572, 95 S Ct 2004. See *Cohen* v *Hurley,* 366 US 117, 123-124, 6 L Ed 2d 156, 81 S Ct 954 (1961). More specifically, controls over solicitation and advertising by attorneys have long been subject to the State's oversight. Federal interference with a State's traditional regulation of a profession is entirely unlike the intrusion of the Court sanctions in *Cantor.*"

That soliciting leads to evils injurious to the public cannot be doubted. One has only to look at *Cohen* v *Hurley,* 366 US 117, 6 L Ed 2d 156, 81 S Ct 954, reh den 374 US 857, 10 L Ed 2d 1083, 83 S Ct 1860 (1961); *Anonymous* v *Baker,* 360 US 287, 3 L Ed 2d 1234, 79 S Ct 1157 (1959) and *NAACP* v *Button,* 9 L Ed 2d at 422-423. Abolishing the barriers against solicitation will lead to unseemly competition by lawyers and their runners to sign up personal injury victims, leading to their harrassment. In this day of sophisticated electronic devices and radio, runners have reached the scene of the accident or sooner than the police and the competition to secure the client becomes intense.

That there was adequate evidence of Appellant's solicitation is established by the lower Court's opinion. Even the dissenting members of the Court concede. "There was indeed substantial evidence that supports the finding Jaques asked a union official to recommend him to persons who had claims." Appendix, 22a.

That the Court struck down the disciplinary rules relating to advertising, *Bates* v *State Bar of Arizona, supra,* does not require it to vitiate the disciplinary rules relating

to soliciting. There is a great difference between advertising and personal solicitation. As the Court said, "In fact because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. For example, advertising claims as to the quality of services — . . . are not susceptible to measurement or vertification; . . . similar objections might justify restraints on in person solicitation." 53 L Ed 2d 835-836. It is just these kinds of claims and others, relating to how much the lawyer can get or has obtained in other cases, that the public is so susceptible to in person solicitation. In fact, in this case, it is this kind of claim made by Appellant of his success in previous case and the quality of his services, which was his pitch to the union representative.

C. The Due Process Violations Claimed By The Appellant Do Not Involve Federal Questions And Are Not Subject To Review By This Court.

The Appellant's claims of due process violations are frivolous. Due process means a fair trial and this he received. He was represented by counsel, over 2000 pages of testimony was taken. He was permitted to call all the witnesses he wanted, except one, Appellee's counsel who refused to testify. All the matters complained of relate to State Law and do not involve Federal or constitutional questions. This Court does not sit as a reviewing Court of any claimed errors by the lower Court. *Selling* v *Radford, supra, Theard* v *United States,* 354 US 278, 1 L Ed 2d 1342, 77 S Ct 1274 (1957).

CONCLUSION

For the foregoing reasons it is respectfully submitted Appellant's jurisdictional statement does not show the Court has jurisdiction and does not present a substantial Federal question, nor do the questions upon which the decision of this cause depends need further argument. The appeal should be denied, or, in the alternative, the Opinion and Judgment of the Supreme Court of Michigan affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1977
No. 77-1306

LEONARD C. JAQUES,
Appellant,

vs

STATE BAR GRIEVANCE ADMINISTRATOR,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF THE
STATE OF MICHIGAN

BRIEF IN REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM APPEAL

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REPLY TO "STATEMENT"

Rather than direct his attention to the facts, as found by the state Supreme Court and upon which discipline was imposed, Appellee chooses to ignore those facts, and the protections afforded that conduct by the Constitution under which this country was founded, by taking refuge in the contention that "Appellant capitulated and offered to plead no contest to an amended allegation". Neither the "no contest" plea to which Appellee refers nor the amended charge played any part in the decision under review. The agreement represented by the plea was subsequently set aside and, at that point, become a legal and factual nullity. The amended allegation was found by the Supreme Court of

Michigan to have no factual support. Reliance by the Administrator can serve no useful function in enlightening this Court as to the issues before it. Quite the contrary. The apparent purpose is to persuade this Court to ignore the fact that the United States Constitution guaranteed to Mr. Jaques, as his birthright, that the conduct here in issue would not be subjected to infringement by the state.

The underlying suggestion seems to be that Appellant has admitted that he has violated Constitutionally permissible Disciplinary Rules. It may be readily dispelled. The "no contest" plea was submitted to the Hearing Panel after the testimony of a number of witnesses, including Appellant, had been received. In order to avoid the strain imposed by the continued hearings and concomitant publicity, and to simplify the issues for decision, a stipulation was entered into pertaining to the charge that he had sought union joinder in the mandamus action and an amended charge, subsequently dismissed by the state court, pertaining to a Mrs. Woolstenhulme.

As to the union joinder charge, Appellant had always acknowledged having sought joinder in the mandamus action to be brought on behalf of his client. With equal consistency, he has always contended that seeking joinder is not forbidden by the Disciplinary Rules. Upon the ruling by the state court that his efforts were within the ambit of the Disciplinary Rules, the consititutionality of those Rules, as construed, was brought in issue and pointedly addressed in the state court. By the agreement which was set aside, it was contemplated that the Panel would proceed from the pertinent facts to decide the controlling issue of law, whether efforts to obtain joinder of a union in a mandamus suit in the nature of a class action were proscribed. Thus, the effect of the agreement was to admit the underlying

facts but not, in any fashion, to concede that these facts constituted a violation of the disciplinary rules.

Relative to the amended Woolstenhulme charge, uncertain accusatory testimony had been received after Appellant had testified under cross examination. It was well understood by the parties and the panel that the nolo contendre plea [here inappropriately termed "no contest" by Appellee] would have the novel effect of a stipulation that no further testimony would be presented and that the Panel's duty to make findings of fact would be discharged on the basis of the testimony adduced, giving consideration to Appellant's denial that any such occurrence transpired. Amendment of the charges was premised on the understanding that the conduct charged was within the ambit of the Disciplinary Rules but that the truthfulness of the allegations of the fact was to be the remaining issue for decision by the Panel. By virtue of the unorthodox meaning attached to the nolo plea, the parties were able to stipulate to the facts on the one charge and confine the dispute to the legal consequence of the admitted facts, while, as to the other charge that was emphatically denied by Appellant, the parties were to confine the disagreement as to the question of fact of the happening of the event with the legal consequences following as the subject of agreement.

In accordance with Michigan law, a nolo contendre plea has the legal effect of resolving all issues of fact, leaving discipline to be imposed as if a guilty plea were entered. Not so in this instance by original decree of the Panel, urged and initially defined by counsel for the Grievance Administrator.

When the Grievance Administrator and the Panel recognized the significance of the scope of the stipulation as

clearly shown by the transcript of testimony when the plea was entered, both the Grievance Administrator and the Panel reneged and disavowed the stipulation previously reached and made this known to Appellant some three weeks later at a "Mitigation Hearing", whereupon the Panel and the Administrator sought to adopt a construction at variance with the original, special meaning carved out of the nolo contendre plea. Appellant thereupon moved to withdraw the plea but was denied that opportunity by the Hearing Panel ,whereupon he appealed to the Grievance Board, which then granted the motion. The case then proceeded to a full hearing before a different Panel.

Under these circumstances, the implication that Appellant has conceded misconduct is grossly inaccurate. He has, of course, admitted seeking joinder and is content to have this Court pass on the Constitutionality of those Rules which, for the first time in Michigan, have been interpreted in this cause as proscribing an attorney, in the representation of his client, from seeking to persuade the union to which his client's deceased belonged to join with him in seeking a Coast Guard investigation of the cause of death.

As to the amended charge, the Michigan Supreme Court has itself dismissed that charge for lack of evidentiary support. It is distressing, to say the least, to find the Administrator reduced to arguing allegations of which Appellant has been acquitted and which are not before this Court. If any response is necessary, it is enough to note that Appellant was subjected to a polygraph examination by Lyn Marcy, former chief staff instructor at the Keeler Polygraph Institute. Appellant furnished to the Administrator's office the results, which showed that he had passed the examination and that the examination confirmed Appellant's testimony that he had not committed the acts

charged against him save his efforts to obtain union joinder in the mandamus action.

The test results were offered into evidence with the further offer to subject himself to examination by a polygraph expert of the Administrator's choice. In addition, Appellant offered to present Mr. Marcy for any questioning deemed advisable by the hearing panel or Administrator. Notwithstanding these offers, the test results were not considered. Instead, the case continued to those hearings which produced the testimony which has been summarized in the Stipulation of Facts compiled by the parties hereto in the pending § 1983 action in the United States District Court for the Eastern District of Michigan. The same has been included at pages 42a-44a of the Jurisdictional Statement hertofore filed. It is those facts which frame the issues for review and upon which discipline was imposed.

The allegation of the Administrator (Motion at page 11) that Appellant spoke of the quality of his legal services is still another unseemly example of refusing to address the issues which are properly before this Court. Appellee's desire to argue matters unsupported by the facts and extraneous to the issues before the Court can only be construed as tacit recognition that the conduct in which he *did* actually engage was constitutionally protected. In fact, during the course of the conference with the union representative, any reference to prior cases was for the limited purpose of explaining that the proposed mandamus litigation, while not commonplace, was litigation which was viable and recognized with favor by the federal courts. If it were truly believed by the Administrator that Appellant had transgressed the Disciplinary Rule (DR 2-101) pertaining to "self-laudatory statements designed to

attract lay clients" most surely such charges would have been brought and Appellant afforded an opportunity to establish the frivolity thereof. By recognizing the lack of factual support for any such allegations, and therefore deciding that they could not be brought in good faith, Appellee has starkly attested by his conduct in the trial of this case that the accusations which he seeks to bandy about before this Court are wholly untenable.

REPLY TO APPELLEE'S ARGUMENT AS TO JURISDICTION

In support of the proposition that this Court lacks jurisdiction to entertain this appeal, Appellee asserts, in essence, that claims arising under the due process clause of the Fourteenth Amendment do not present federal questions (Motion at p. 11). He also argues that this Court lacks jurisdiction to construe and apply the First Amendment for the reason that no such issue was presented to or decieded by the state court (Motion at p. 5). Neither jurisdictional attack is well-founded.

The former proposition does not warrant an extended response. Suffice it to note that a plethora of authority demonstrates that this Court does indeed have jurisdiction to construe and apply the United States Constitution, including the Fourteenth Amendment thereto. To accept the invitation to hold otherwise would mark a great departure from those cases collected at 5 United States Supreme Court Digest, §§513-854, pp. 436-846 where claims founded on the due process clause have been decided by this Court.

In support of the latter proposition, Appellee relies on six cases, each of which was decided more than forty years ago. Their continuing validity, even in comparable fact

situations, is open to serious question. The more modern decisions demonstrate that this Court has taken an active role in the protection of our most precious and fundamental freedoms. No longer can difficult substantive questions be ignored by reliance on procedural niceties. More importantly, the facts of this case are so different, from a procedural standpoint, than those relied on by the Administrator, that upon close examination it will be seen that they furnish ample grounds for the exercise of jurisdiction over and above the grounds set forth herein and at pages 2-6 of the Jurisdictional Statement.

In *Herndon* v *Georgia,* 295 US 441, 443 (1935) and *Live Oak Association* v *Railroad Commission,* 269 US 354, 359 (1926), affirmance on *substantive* grounds was compelled because adequate independent state grounds existed in support of the state court judgment. In *American Surety Co* v *Baldwin,* 287 US 156, 166-169 (1932), the merits were addressed and the Appellant held not entitled to relief by reason of res judicata and the lack of merit as to the due process claim. Thus, these cases demonstrate a willingness to consider substantive constitutional claims, and do not countenance the deprivation of fundamental rights on purely procedural grounds. Therefore, any procedural pronouncements may be regarded as dicta.

McGarrity v *Delaware Bridge Commission,* 292 US 19 (1934) and the cases referred to in the preceeding paragraph are also readily distinguishable on the jurisdictional question as well. All address themselves to the appellate posture of a case where, (1), the federal question was not raised on direct review in the state court, (2), the state court decision on direct review does not address the federal question, (3), in denying a petition for rehearing, the

state court did not consider the merits of the federal question presented, and, (4), the state court decision did not impose a novel construction that first gave rise to the federal question. The precedential value is contingent on the existence of those four factors. Here, none exist.

A primary purpose served by the requirement that a federal question be raised in the state court is to provide the state with an opportunity to itself correct errors of federal proportion. However, there is no requirement that a specific form of words or phraseology be employed to raise the federal question. *Green Bay & Canal Co* v *Patten Paper Co,* 172 US 58, 68 (1898); *New York ex rel Bryant* v *Zimmerman,* 278 US 63, 67 (1928); *Street* v *New York,* 394 US 576, 584 (1969). Consistent with the purposes served by the jurisdictional prerequisite, all that is required is efforts by the Appellant to bring the federal question to the attention of the state court. *Green Bay & Canal Co, supra; Street* v *New York, supra; Live Oak Association, supra.*

As set forth as pages 3-4 of the Jurisdictional Statement, Appellant pointedly addressed the attention of the state court on direct review, prior to decision, to many of the decisions of this Court upon which resolution of the First Amendment issues must turn. Indeed, the free speech guarantees of the First Amendment were specifically cited as were the correllative constitutional rights of the recipients of the communications here in issue. The constitutional questions posed here have, then, been brought to the attention of the state court with more than sufficient force to permit the state court to consider the free speech implications of its decision.

The efforts of the state court to distinguish the under-

lying First Amendment rationale of *Bates* v *State Bar of Arizona,* 433 US 350 (1977) shows that the state court itself recognized the federal question that had been presented to it. As pointed out at page 4 of the Jurisdictional Statement, this aloné demonstrates state court consideration of the federal question such that this court's jurisdiction would have been properly invoked even in the absence of briefing by Appellant in that court. Additionally, the state court decision affirming Appellant's decision inherently required disposition of the federal claim. He could not have been suspended unless the free speech issue had been disposed of adversely. There is no requirement that the state court deal with the issue in any specified degree of detail, for otherwise, the state could insulate its decisions on federal questions from review by this Court by the simple expedient of failing to articulate the grounds of decision. The dual elements of presentation by Appellant and decision by the state court place this case in a markedly different posture than those upon which Appellee relies. Because of these dual elements, the jurisdictional prerequisites of 28 USC §1257(2) have been satisfied on direct review.

While consideration of the rehearing petition is therefore unnecessary, it too provides the basis for relief. As Appellee concedes, the rehearing petition provided the state with an even greater opportunity to decide the federal question, as the question was presented with even greater forcefulness. Moreover, the denial of rehearing reflects that the state court did consider the merits of the federal issue. In denying the petition, the justices necessarily disagreed with the dissenters who thought the *Edna Smith Primus* and *Albert Ohralik* cases, now pending in this Court, would be decisive. As the state court considered the merits of the federal question in denying the petition for rehearing, this

case is squarely within the ambit of the rule that this Court's jurisdiction is properly invoked when the state court considers the merits of the federal question presented on rehearing. *Mallett* v *North Carolina,* 181 US 589, 597 (1901).

Finally, the general doctrine that presentation of the federal question for the first time on rehearing does not preserve the question for review is not an inflexible one. The federal question is timely presented on rehearing when a novel construction is imposed on direct review such that rehearing provides the first opportunity to present the federal question. This is explicitly recognized in *Brinkerhoff-Farris Co* v *Hill,* 281 US 673, 678 (1929) which is cited in Appellee's Brief. Indeed, cases finding the lack of jurisdiction make it clear that the denial of jurisdiction is premised on the absence of a new construction by the state court. *Herndon,* 295 US at 443-444; *American Surety Co,* 287 US at 164.

Herndon is particularly illustrative. There, the Court recognized that rehearing would have properly preserved the federal question if the ruling of the state court on direct review could not have been anticipated. Dismissal was squarely predicated on the fact that a prior state case had adopted the same construction imposed in *Herndon.* By way of contrast, the Michigan Supreme Court has never before construed the Disciplinary Rules in the fashion here employed. It is that very novel construction which makes the Michigan Disciplinary Rules so vulnerable to constitutional attack. Under these circumstances, the federal question has been presented at the first opportunity. See Jurisdictional Statement, pages 4-5.

In an effort to bolster the argument that this Court lacks

jurisdiction, Appellee places his reliance on *Whitney* v *California,* 274 US 357 (1926). That case is, indeed, enlightening. It demonstrates even more forcefully that this Court's jurisdiction has been properly invoked in this case. In *Whitney,* this Court accepted jurisdiction and resolved on their merits the constitutional claims raised, despite the fact that "here the record does not show the defendant raised or that the state court considered or decided any Federal question what-ever . . . [except by virtue of a stipulated post-decision order]."

Any effort to read *Whitney* as a broad jurisdictional hurdle is destined to failure by reason of *Konigsberg* v *State Bar of California,* 353 US 252 (1957). While the dissenting justices referred to *Whitney,* the *Konigsberg* majority recognized its jurisdiction despite the inartfulness with which the federal question was raised in the California court. There, the federal question was held to have been properly preserved for presentation to this Court when it had been presented to the state court only as a sweeping allegation in the petition for review. Accordingly, this Court's jurisdiction was properly invoked in *Konigsberg, despite the fact that the question had in no way been briefed or the state court referred to the controlling authority.* A fortiori, there is jurisdiction to decide this case where the federal question was amply briefed on direct review by the Michigan Supreme Court.

For all of the foregoing reasons, jurisdiction is properly vested in this Court to decide whether the Constitution of the United States is contravened by the imposition of discipline for the conduct in question and by the procedures employed in the state. The cases upon which Appellee relies for a contrary conclusion are inapplicable in fact and in law.

REPLY TO APPELLEE'S SUBSTANTIVE ARGUMENT

Without knowing the specific cases to which Appellee refers in support of the suggestion that this Court is reluctant to review state bar disciplinary cases, it is impossible to comment with precision on the purported statistical analysis found at page 6 of the Motion. The contention that this Court has only once reversed the state disciplinary proceedings is, however, frivolous. See *Spevack* v *Klein*, 385 US 511 (1967) and *Bates* v *State Bar of Arizona*, 433 US 350 (1977) for but two examples. In addition, the analogous decisions of state bar organizations not to permit persons to be admitted to the practice of law in the first instance have been overturned by this Court as well. *Schware* v *Board of Bar Examiners*, 353 US 232 (1957); *Konigsberg* v *State Bar of California, supra*. As the major premise underlying the Administrator's argument is untenable, it is unnecessary to demonstrate at length the self-evident fallacy of the argument that the supposed insubstantiality of the issues raised by *other* litigants is of any significance to the question of whether the distinct issues raised by *this* litigant warrant formal submission.

It is, of course, true that in *Theard* v *United States*, 354 US 278 (1957); *In re Ruffalo*, 390 US 544 (1968); *In re Isserman*, 345 US 286 (1953) and *Selling* v *Radford*, 243 US 46 (1917) this Court did not disturb state decisions precluding an attorney from state courts. But it is sheer sophistry to argue, as does the Administrator, that this is because such proceedings enjoy some sort of special immunity from this Court's review powers. In none of the above cases did this Court review the banishment from state courts! In each, this Court was faced only with ancillary federal proceedings to bar the attorney from *federal*

courts. That this Court has not reversed proceedings which were never reviewed can lend no precedential force to the Administrator's argument that it must refrain from deciding a case such as this where an appeal *is* taken from the state-imposed discipline.

Compounding the Administrator's misconception that the state occupies a position of supremacy in the construction and application of the Constitution of the United States (See Jurisdictional Statement, pp. 20-22) is the contention (Motion, page 11) that "This Court does not sit as a reviewing Court of any claimed errors by the lower Court." To be sure the highest state court is the final authority on pure questions of state law. But it may be said, with equal confidence, that the Supreme Court of the United States is the highest authority for the construction and application of the Constitution of the United States. Where the state, by its actions, has infringed upon those rights conferred by that Constitution, this Court has shown no reluctance to correct those errors by the state court which are of constitutional dimensions. *Bates* v *State Bar of Arizona, supra; Spevack* v *Klein, supra; Schware* v *Board of Bar Examiners, supra.* As the court in *Konigberg* v *State Bar of California, supra* explained, it is the United States Constitution, here in issue, that limits the court's review powers:

"We recognize the importance of leaving states free to select their own bars, but it is equally important that the state not exercise this power in an arbitrary or discriminatory manner. Nor in such way as to infringe on the freedom of political expression or association."

"A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms to obtain that goal. It is also important to society that

lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar". 353 US at 273.

It must be borne in mind that those provisions of the Constitution upon which this appeal is premised, Article 6, Clause 2, the First Amendment, and the Fourteenth Amendment, are all explicit limitations on what the state may do. Those provisions necessarily contemplate the role *of this Court* in assuring that those limitations have not been overstepped by the state. Resort by Appellant to the aforesaid constitutional provisions limiting the exercise of state power is a *prerequisite* to the invocation of Supreme Court jurisdiction, not as Appellee suggests, an *impediment* to the exercise of that jurisdiction.

Appellee misapprehends the thrust of the associational guarantees embodied in the First Amendment when he argues (Motion at page 9) that those guarantees are inapplicable because "Appellant was seeking the union to join in a class action for the benefit of his client in purely personal litigation". That proposition is not well founded in law or in fact.

The proposed mandamus action was, of course, a matter of acute interest to Appellant's client who wished a competent investigation into the cause of his son's death. Yet it is hard to discern a compelling state interest in enacting regulations which the state has interpreted so as to punish an attorney for seeking to vindicate the interests of his client. Over and above the personal interest of Appellant's client in the mandamus litigation, Mr. Woods was assuredly not the only one interested in securing a Coast Guard investigation any more than the nominal plaintiffs in the desegregation litigation examined in *NAACP* v *Button*, 371 US

415; 83 S Ct 328; 9 L Ed 2d 405 (1963) were fostering "purely personal litigation". A thorough Coast Guard investigation would benefit an all too large number of others who lost loved ones in the tragic explosion, as well as Mr. Woods himself.

Indeed, the mandamus action was of interest to a number of workers and their families concerned about working conditions that take their toll in human lives. A thorough investigation could also be expected to reveal the cause of the explosion so that efforts could be taken to prevent a recurrence. The successful elimination of unsafe working conditions would serve a wide range of public interests as well as the interests of Appellant's client. Thus the characterization of the proposed litigation in the nature of a class action as "purely personal litigation" is inaccurate. Any multi-plaintiff litigation by definition involves more than rights of a single person.

Nor can the litigation be characterized as legal action for the benefit of the involved attorney. The services of Appellant were to be provided to his client at no cost and any ancillary services to other plaintiffs were also to provided without cost. In *NAACP* v *Button*, the staff attorneys were to receive from the organization attorney fees, but this factor was held not to deprive the activities of their constitutionally protected status. The efforts of Appellant provide an even stronger factual basis for upholding the applicable First Amendment associational guarantees.

The efforts of Appellee to distinguish this case factually (Motion at pages 7-9) must also be roundly rejected. In deciding *NAACP* v *Button*, supra, this Court made it exquisitely clear that the associational guarantees recognized in that case could not be confined to the unique organiza-

tional goals of the NAACP or the particular litigation there in question. 371 US at 444-445. In the wake of *NAACP* v *Button,* this Court has repeatedly held that an attorney and union may join forces even in fee-generating personal injury litigation and that the State may not permissibly interfere with this relationship. *Union Mine Workers, District 12* v *Illinois State Bar Association,* 389 US 217 (1963); *Brotherhood of Railroad Trainmen* v *Virginia,* 377 US 1 (1964); *United Transportation Union* v *State Bar of Michigan,* 401 US 576 (1971).

It may well be that the state has a genuine interest in preventing lawyers from perpetrating fraud upon consumers of legal services. But this objective can no more justify the total proscription imposed by the Michigan Disciplinary Rules than the state's interest in protecting its citizens from hard core pornography justifies burning all books. The notion that First Amendment rights must be sacrificed to accommodate regulations so overbroad as to prohibit constitutionally guaranteed freedoms has long been discredited by the cases referred to in the preceeding paragraph. Also discredited, incidentally, is *Cohen* v *Hurley,* 366 US 117 (1961), relied on by Appellee (Brief at p. 10). This Court has explicitly repudiated *Cohen* in *Spevack* v *Klein,* 385 US 511, 514 (1967).

This is not to suggest that the state is impotent to deal with conduct by attorneys that conflicts with a compelling state interest. To survive constitutional scrutiny, the state must only identify those unprotected actions which are evil and conflict with compelling state policy and tailor the Discipinlary Rules to that conduct. What the state may not constitutionally does is prohibit an attorney from cooperating with a union in the representation of an existing

client in the name of forbidding a lawyer from sending a runner ("with sophisticated electronic devices and radio", Appellee's Motion, p. 10) to an acciden scene ahead of the police to harass an accident victim.

Appellee also takes solace in the observation (Motion, page 10), "that there was adequate evidence of 'solicitation' ". The problem is that the term "solicitation"; which has come to be used as an epithet by bar disciplinarians unable to address the character of the conduct and communications in question, lacks a precise definition that gives the term any real meaning. Indeed, "solicitation" is not, as such, either forbidden by, or defined in, the Disciplinary Rules. Rather, they prohibit a whole host of attorney communications far broader than those which fall within the common understanding of solicitation. To a large extent, it is the very nebulous quality of the word, as well as the tendency of the organizeed bar to rely on home-spun definitions in support of constitutionally untenable prohibitions, that has required this Court to repeatedly reaffirm that it will not permit the facile use of the word solicitation to distract it from its obligation to compare the *conduct* with the rigorous limitations of the First Amendment. *NAACP* v *Button,* 371 US 415, 429 (1963); *Bates* v *State Bar of Arizona, supra; Brotherhood of Railroad Trainmen* v *Virginia,* 377 US 1, 6 (1964).

There is, of course, ample evidence that Appellant, in the representation of his client, sought joinder by the union and affected members in the mandamus action. If this is solicitation, it is made so only by the unorthodox definition employed. To suggest that the Administrator's use of the term makes Appellant's conduct any less constitutionally protected is about as persuasive as the contention that a

round Earth is made flat by the consensus pre-Columbus view of the world.

The same comments are appropriate in response to the suggestion that there was evidence that Appellant asked McLaughlin to recommend him to individual claimants. All participants testified that there was a single meeting at which Appellant and McLaughlin were present, that the purpose of the meeting was to discuss the proposed mandamus action and the advisability of framing the action as multiple-plaintiff litigation, and that this was in fact the tenor of the discussions. In addition, all those present who were called as witnesses testified that Appellant did not ask McLaughlin to recommend him to those with death and personal injury claims arising from the explosion.

Appellant himself swore that he had not done so. McLaughlin also pointedly affirmed that he had not been asked by Appellant to recommend him to potential personal injury claimants. See Jurisdictional Statement, page 13. Marilyn Jean Kelly, associate attorney with Appellant's firm, lent confirmation by her testimony that no such request was among the topics discussed by Appellant and McLaughlin. The priest, Father Luigi Maggioni, and two laborers present at the meeting, Donald Davis and Maruin Gill, also testified that the topic of discussion at the meeting was the mandamus action and that Appellant made no request to be recommended as counsel for those who were possessed of individual causes of action.

Simply stated, there is absolutely no evidence of solicitation in the conventional sense. It cannot be presumed that the Michigan Supreme Court could have found a violation of the Disciplinary Rules on the basis of the testimony set forth above, for to have done so would constitute the

grossest violation of due process. *Thompson* v *City of Louisville,* 362 US 199 (1960). It is, then, that evidence which is recited in the state court opinion and made the subject of the Stipulation of Facts (Jurisdictional Statement, 42a-44a) demonstrates the outlandish construction imposed on the Disciplinary Rules.

Appellant testified that agreements to represent, for purposes of the mandamus action only, were present at the meeting. He steadfastly denied that there were contingent fee agreements present. This position was supported by Father Maggioni, Mr. Gill and Mr. Davis who testified of having seen no such documents. Marilyn Jean Kelly testified that there were contingent fee agreements on a table, but she did not know how they had gotten there or what had happened to them.

Of necessity, then, it is the testimony given by McLaughlin, the business agent, which provides the basis for the discipline imposed. This is made eminently clear by the state court decision as well as the Stipulation of Facts. It is that very testimony which underscores the unprecedented construction of the Disciplinary Rules imposed by the state court in reaching its decision.

The business agent testified the meeting with Appellant was for the sole purpose of discussing joinder in the mandamus action. At the time, McLaughlin had undertaken the obligation of finding attorneys to represent the union members injured and the survivors of those who had been killed in the explosion. This undertaking was not expressed to Appellant prior to the meeing. When McLauglin told Appellant that he was seeking counsel, he asked for and received business cards and form contracts from Appellant

who said that McLauglin could distribute the cards if he wanted to. This, then, is the testimony most favorable to the Administrator. It is recited with reliance in the state court Opinion and is identified as such in the Stipulation of Facts. If this is "solicitation", it is not made so by any conventional definition. By whatever name it is called, it is conduct protected by the United States Constitution.

WHEREFORE, Appellant prays that this Honorable Court note probable jurisdiction and, upon full review, reverse the decision of the state court.

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